Supreme Court, U. S.
FILED
JUN 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

Petitioners,

vs.

LINDA KAY SPARKMAN and LEO SPARKMAN,

Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
219-423-9551,

*Counsel for Petitioners.*

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

## INDEX.


| | PAGE |
|---|---|
| Opinions Below | 1-2 |
| Jurisdiction | 2 |
| Questions Presented for Review | 3 |
| Constitution and Statutes | 3-5 |
| Statement of the Case | 5-7 |
| Reasons for Granting the Writ | 7-15 |
| I. The Decision of the Court Below Conflicts with the Applicable Decisions of the United States Supreme Court Concerning Judicial Immunity | 7-13 |
| II. The Decision of the Court Below Will Affect the Scope of Exposure to Personal Liability of Every Trial Court Judge in the Nation | 13-15 |
| Conclusion | 15 |

APPENDIX.

| | |
|---|---|
| Unpublished Memorandum of Decision and Order of District Court | A1-A7 |
| Opinion of Court of Appeals Reversing District Court | A8-A15 |

## TABLE OF AUTHORITIES.

*Cases.*

A. L. v. G. R. H., 46 Ind. Dec. 452, 325 N. E. 2d 501 (1975) ..... 8, 9, 10

Baltimore & Ohio Railway Co. v. Freeze, 169 Ind. 370, 82 N. E. 761 (1906) ..... 9

Bradley v. Fisher, 80 U. S. (13 Wall.) 646 (1871) ..... 6, 7, 10, 11, 13, 14, 15

Johnson v. MacCoy, 278 F. 2d 37 (9th Cir. 1960) .... 12

Pierson v. Ray, 386 U. S. 547 (1967) ... 6, 7, 10, 13, 14, 15

Ryan v. Scoggin, 245 F. 2d 54 (10th Cir. 1957) ..... 11

Waugh v. Board of Commissioners of Montgomery Co., 64 Ind. App. 123, 115 N. E. 365 (1917) ..... 9, 10

*United States Constitution.*

Amendment XIV ..... 3, 6

*Federal and State Statutes.*

Federal Statutes

42 U. S. C. § 1983 ..... 3, 6

42 U. S. C. § 1985(3) ..... 3, 6

State Statutes

I. C. 1971, § 16-8-3-1 ..... 4, 8, 9

I. C. 1971, § 16-8-4-2 ..... 4, 8

I. C. 1971, § 33-4-4-3 ..... 5, 7, 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

**No.**

---

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

Petitioners,

vs.

LINDA KAY SPARKMAN and LEO SPARKMAN,

Respondents.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

Harold D. Stump, John H. Hines, Harry M. Covell and Warren G. Sunday, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit in the entitled case rendered on March 23, 1977.

### OPINIONS BELOW.

To Plaintiffs' Complaint, Defendants, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D., and DeKalb Memorial Hospital, Inc. filed, among other responsive pleadings, Motions to Dismiss.

In his Memorandum of Decision and Order filed May 15, 1976, the United States District Court for the Northern District of Indiana, Fort Wayne, Division, Jesse E. Eschbach, Judge, granted said motions stating that Defendant, Harold D. Stump, acting as a Circuit Court Judge in a State Court, was clothed with absolute judicial immunity and that Plaintiffs had no constitutional claims which could be asserted against the remaining Defendants. The District Court's Memorandum of Decision and Order appears as *Sparkman* v. *McFarlin*, Civil No. F 75-129 (D. Ind., decided May 13, 1976).

An Appeal from the District Court's Order was taken by Plaintiffs to the United States Court of Appeals for the Seventh Circuit which Court, by Opinion rendered March 23, 1977 reversed the Judgment of the District Court and remanded the cause for further proceedings consistent with its Opinion. The Opinion of the United States Court of Appeals for the Seventh Circuit appears as *Sparkman* v. *McFarlin*, Civil No. 76-1706 (7th Cir., decided March 23, 1977).

The Memorandum of Decision and Order of the District Court Judge and the Opinion of the United States Court of Appeals for the Seventh Circuit are reprinted in the Appendix hereto.

## JURISDICTION.

This is a controversy founded upon Plaintiffs' assertion of causes of action arising under the First, Fourth, Fifth, Eighth, Nineth and Fourteenth Amendments to the Constitution of the United States and under 42 U. S. C. §§ 1983 and 1985(3), with jurisdiction laid under 28 U. S. C. §§ 1331 and 1343. Plaintiffs sought declaratory relief pursuant to 28 U. S. C. §§ 2202-2203.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).



## QUESTION PRESENTED.

Whether the duly elected Judge of the Circuit Court of DeKalb County, Indiana, a Court of original, exclusive jurisdiction in all cases at law and equity whatsoever, had jurisdiction to consider and approve a Petition presented by Ora E. McFarlin, the natural mother and custodian of Linda Kay Sparkman, to have tubal ligation performed on said Linda Kay Sparkman, and whether said act of approval is clothed with judicial immunity from liability under the federal civil rights statutes.

No other questions were presented on appeal to the United States Court of Appeals for the Seventh Circuit.

## CONSTITUTION, FEDERAL AND STATE STATUTES.

United States Constitution, Amendment XIV, Section 1 provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. § 1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person of privileges and immunities under

the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

I. C. 1971, § 16-8-3-1 provides in part:

"Medical or surgical treatment of incompetent—Consent. —Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senilty, habitual drunkenness or drug addiction may be given by the following persons, and such consent shall, on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:

(a) If the patient is an unmarried unemancipated minor, by one (1) parent having custody of such minor, Provided, That if there is no such parent, by the legal guardian of the minor, and further Provided That if the patient is a neglected child, by the agency of which the child has been made a ward of the juvenile court; . . ."

I. C. 1971, § 16-8-4-2 provides:

"Consent of parent to medical treatment of child.—Any person who is the parent of a child shall be competent to



given consent to and contract for medical or hospital care or treatment of such child including surgery."

I. C. 1971, § 33-4-4-3 provides:

"Jurisdiction.—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

## STATEMENT OF THE CASE.

When Plaintiff, Linda Kay Sparkman, was fifteen (15) years old, her mother, Ora E. McFarlin, determined that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for this decision were that, according to her mother, "Linda was somewhat retarded", that without her mother's consent or knowledge, Linda had allegedly taken up dating and staying overnight with older youths and men, and that her mother was unable to maintain continuous control and observation over Linda to "prevent unfortunate circumstances". Consequently, her mother sought the services of an attorney, Warren G. Sunday, who prepared a certain "Petition to Have Tubal Litgation Peformed on Minor and Indemnity Agreement." By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This Petition was thereafter presented to

Defendant, Harold D. Stump, Judge of the Circuit Court of DeKalb County, Indiana, who "approved" the ex parte application. Thereafter on July 16, 1971, the three Defendant doctors performed the ligation at the Defendant hospital.

In ruling on the Motions to Dismiss filed by all Defendants except Defendant, Ora E. McFarlin, the United States District Court for the Northern District of Indiana, Fort Wayne Division, held, with respect to the question here presented, that the only State action involved was that of Judge Harold D. Stump as Judge of the DeKalb Circuit Court, Indiana, "approving" Defendant, Ora E. McFarlin's Petition and held further that since the Circuit Courts of Indiana are Courts of general jurisdiction having "original, exclusive jurisdiction in all cases at law and in equity whatsoever", Judge Harold D. Stump had jurisdiction in his Court to consider Petition for Tubal Ligation; and although said "approval" may in retrospect have appeared to have been premised on an erroneous view of the law, the fact that subject matter jurisdiction resided in Judge Harold D. Stump clothed the act with absolute judicial immunity from liability under 42 U. S. C. §§ 1983 and 1985(3) or under the Fourteenth Amendment. The District Court founded its holding upon the settled and established precedent laid down in *Bradley* v. *Fisher*, 80 U. S. (13 Wall.) 646 (1871) and *Pierson* v. *Ray*, 386 U. S. 547 (1967) both of which cases hold that except where there is a "clear absence of all jurisdiction over the subject matter", a Judge is entitled to complete immunity to suit based upon his official acts.

The United States Court of Appeals for the Seventh Circuit, by Opinion dated March 23, 1977, reversed. The Opinion of Judge Swygert, although paying lip services to the unequivocal holdings of *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra, ex post facto* changed the law and held that the words "clear absence of all jurisdiction over the subject matter" should not be given their clear and obvious meaning. Taking the position that the statute conferring general jurisdiction upon the Circuit Court



(I. C. 33-4-4-3) which states: ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer" is meaningless, the Court of Appeals without citing any authorties therefor, held, as a matter of law, that "a claim must be characterized as a case in law or in equity in order to come within the statute".

In essence, the Court held that neither Judge Harold D. Stump nor any other Circuit Court Judge has a right to reply upon the Indiana statutes conferring jurisdiction upon Circuit Courts in the State nor upon the clear language of *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.*

## REASONS FOR GRANTING WRIT OF CERTIORARI.

### I.

This Petition should be granted by this Court because the decision of the United States Court of Appeals for the Seventh Circuit conflicts with and represents and unwarranted departure from the applicable decisions of this Court concerning judicial immunity.

Petitioner submits that this Court should review this case because the Court below ignored the body of law developed by this Court in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra,* which enunciate doctrines establishing judicial immunity. Those cases, and cases hereinafter set forth, hold that unless the act of a Judge of a court of general jurisdiction has been proscribed, that is, his jurisdiction to act limited by statute or by judicial fiat, the act of a Judge, sitting in his judicial capacity, is clothed with judicial immunity.

On July 9, 1971, there was no specific judicial or statutory proscription in the State of Indiana against a parent consenting to surgery on a minor child involving tubal ligation. Such proscription did not occur until 1975 when the Appellate Court of

Indiana in the case of *A. L.* v. *G. R. H.*, 46 Ind. Dec. 452, 325 N. E. 2d 501 (1975) first announced:

> "We believe that common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom." *A. L.* v. *G. R. H., supra,* at 502.

Likewise, in the year 1971, in addition to Indiana Code 33-4-4-3 which invests Circuit Courts in the State of Indiana with general jurisdiction there was in full force and effect in the State of Indiana the following statutes:

> "I.C. 16-8-3-1 *Medical or Surgical Treatment of Incompetent—Consent.* Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness or drug addiction may be given by the following persons and such consent shall on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:
>
> (a) If the patient is an unmarried, unemancipated minor, by one (1) parent having custody of such minor, provided, that if there is no such parent, by the legal guardian of the minor, and further provided that if the patient is a neglected child, by the agency of which the child has been made a ward of the Juvenile Court; . . ."
>
> and
>
> "I.C. 16-8-4-2 *Consent of Parent to Medical Treatment of Child.* Any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

The Federal District Court, in its Memorandum of Decision and Order makes reference to the fact that Mrs. Ora E. McFarlin, by filing her Petition to Have Tubal Ligation performed, consented to the performance of the operation. The fact of said consent serves to make the distinction between the Court's "approval" referred to erroneously by the United States



Court of Appeals for the Seventh Circuit as the Court's "order" significant. Again, prior to the decision of *A. L.* v. *G. R. H., supra,* no judicial determination had been made in the State of Indiana construing or delimiting what surgery might be consented to by the parent or approved by a Circuit Court Judge.

The existence of the aforementioned statutes, the contents of which were presumably known by the Judge in July 1971, conferring general jurisdiction over all causes, matters and proceedings and conferring the right to consent of a parent on behalf of a minor child to perform surgery, cannot be ignored. Judge Swygert was in error when he stated in his opinion:

> "Moreover, counsel has not, during the course of this litigation cited any specific statutory or common law basis upon which a Court can order the sterilization of a child simply upon the petition of a parent."

I. C. 16-8-3-1 was specifically set forth in the Answer Brief of Defendant Appellees, John C. Harvey, M.D. and DeKalb Memorial Hospital, Inc., as a plausible basis of jurisdiction of Defendant, Harold D. Stump, to approve the petition.

The fact that the record before the Circuit Court of Appeals did not contain a finding by the Circuit Court Judge of the specific basis upon which he acquired jurisdiction cannot be used as a basis for concluding the Court had no jurisdiction to act. Long established precedent in the State of Indiana evidenced by two cases, to-wit: *Baltimore & Ohio Railway Company* v. *Freeze,* 169 Ind. 370, 82 N. E. 761 (1906), and *Waugh* v. *Board of Commissioners of Montgomery County,* 64 Ind. App. 123, 115 N. E. 356 (1917), established the rule that if the Judge has jurisdiction over the subject matter, he has jurisdiction to determine whether he has jurisdiction over the parties. In *Baltimore & Ohio Railway Company* v. *Freeze, supra,* the Court said:

> "Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject matter of the action. It is well settled that, when an inferior tribunal

is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A decision on a jurisdictional question, either expressly or impliedly given by a tribunal, has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceedings, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected. . . ."

*Waugh* v. *Board of Commissioners of Montgomery County, supra* held:

> "Every court is clothed with authority to determine its own jurisdiction, both of parties and of subject matter and when it appears of record from a court of inferior jurisdiction such as the Board of Commissioners, that the jurisdiction of such tribunal was invoked in a given matter and that it was required to decide on facts essential to such jurisdiction, its judgment thereon is conclusive against collateral attack unless want of jurisdiction is apparent on the face of such record. . . ." *Waugh*, at 360.

This long standing unimpeachable rule was ignored by the Circuit Court of Appeals.

In 1971, there was statutory basis conferring jurisdiction upon Defendant, Harold D. Stump, to entertain Defendant McFarlin's Petition. That fact is supported, a fortiori, by the fact that in *A. L.* v. *G. R. H., supra*, a Circuit Court Judge in Indiana conducted a trial on a complaint for declaratory judgment alleging no existing Indiana precedent, seeking declaration of a parent's right under the common law attributes of the parent-child relationship to have her son sterilized.

The Court of Appeals further ignored the requirements laid down by *Bradley* v. *Fisher, supra*, and *Pierson* v. *Ray, supra*, in that the fact of absence of all jurisdiction must be known to the Judge. Nothing in the record presented to the Circuit Court of Appeals permitted Judge Swygert to reach the conclusion that



Judge Harold D. Stump knew that he had no jurisdiction to consider McFarlin's Petition nor to act thereon. The record including the Memorandum of Decision and Order of the United States District Court does not suggest such nor permit that inference.

*Bradley* v. *Fisher, supra*, remains the undisturbed authority with respect to the doctrine of judicial immunity. It provides:

> ". . . that Judges of Courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when some acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority and for the exercise of such authority *when the want of jurisdiction is known to the Judge*, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the Judge or in the Court with keyholes, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case although upon the correctness of his determination in these particulars the validity of his judgment may depend. . . ." *Bradley* v. *Fisher*, at 651 (emphasis added).

In *Johnson* v. *MacCoy*, 278 F. 2d 37, 38 (9th Cir. 1960), the Court reiterated the rule:

> "The well recognized exception to such general immunity of a judicial officer is defined in the same case (*Bradley* v. *Fisher, supra*)—raising the distinction between an act done in excess of jurisdiction, and an act done in clear absence of all jurisdiction *and known to the Judge to be such.*" *Ryan* v. *Scoggin*, 245 F. 2d 54 (10th Cir. 1957). (emphasis added)

Of equal import to the reiteration of the rule requiring knowledge enunciated by *Johnson* v. *MacCoy, supra*, is the following statement:

> "Nor do we think that because one Judge believes a warrant should issue and that he has jurisdiction to issue it and a second Judge of the same Court believes that the first Judge has no such jurisdiction is of any material consequence. *Each Court has jurisdiction to determine its own jurisdiction*. . . ." *Johnson* v. *MacCoy*, at 40 (emphasis added).

The approval appended to Ora E. McFarlin's sworn petition shows on its face that it was approved by Harold D. Stump solely in his role as Judge of the DeKalb Circuit Court. It cannot be seriously contended that the Petition was presented to him in any other capacity. The act of approval was a judicial act.

In the year 1971, there was no proscription, by statute or judicial fiat, against his approval of the Petition.

The statutory scheme to which Judge Swygert refers on page 5 of his Opinion did not, by its terms negate sterilization under any other circumstances. It did not, by its terms, proscribe sterilization of persons other than institutionalized persons.

Similarly, Judge Swygert's assertion on page 6 of his Opinion in construing the effect of *A. L.* v. *G. R. H., supra,* is mistaken. The effect of that case is not to remove *jurisdiction* from Circuit Courts concerning sterilization, but to remove that *authority* from the Court which would invest parents with the power to sterilize their children. From and after April 10, 1975, all Circuit Court Judges in the State of Indiana, including Judge Harold D. Stump, were aware of the fact that the decision in *A. L.* v. *G. R. H., supra,* deprived them of *authority* to permit parents the power to sterilize their children, but most certainly said Courts were not deprived of *jurisdiction* to consider and act upon petitions requesting such authority.

The statement by Judge Swygert on page 6 of his Opinion, to-wit:

> "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take."



is characteristic of the tenor of the Opinion itself. It ignores all of the clearly enunciated fundamentals of judicial immunity laid down by *Bradley* v. *Fisher, supra,* and reinforced by *Pierson* v. *Ray, supra,* and cites no authority in support. The example set forth in the footnote is absurd.

Finally, the Court's remark on page 8 of his Opinion that ". . . the Petition and Order were never filed in Court", suggests that "filing in Court" in an apparently formal way is an absolute antecedent requirement to a Circuit Court in Indiana having jurisdiction over the subject matter of the Petition. This statement is likewise unsupported by any authority.

The rule is and should be that unless Judge Harold D. Stump's act in approving Ora E. McFarlin's Petition was, in 1971, specifically proscribed, said judicial act must be clothed with immunity from liability. That Defendant Harold D. Stump acted in excess of his jurisdiction is now realizable. To hold that he acted in the clear absence of all jurisdiction and with knowledge of that fact is without basis in law or fact.

## II.

This Petition should be granted because this case represents an issue of national importance which will affect the scope of exposure to personal liability of every trial court judge in our country.

The doctrine of judicial immunity exists not solely for the benefit and protection of a judge whose act within his judicial role may arouse the most intense feelings of the litigants, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences so as not to be intimidated. See *Pierson* v. *Ray, supra.*

This Court by its decisions has recognized the doctrine of judicial immunity in all cases except those in which there is a "clear absence of all jurisdiction over the subject matter" and

"when that want of jurisdiction is known to the judge". *Bradley* v. *Fisher, supra.*

The decision of the United States Court of Appeals for the Seventh Circuit, if allowed to stand, would render meaningless the standards for judicial immunity as established by this Court in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.* The lower court would in their place substitute a standard which would require a court of general jurisdiction to act only pursuant to some specific and affirmative legislative or judicial grant of authority before jurisdiction could be found. This difference, although subtle, is significant. The practical result of the lower court's decision would be that a judge presiding over a court of general statutory jurisdiction, with jurisdiction to decide "all cases at law or equity whatsoever" and "all other causes, matters and proceedings where exclusive jurisdiction is not conferred by law upon some other court" would not be able to rely upon this broad grant of jurisdiction to act upon matters brought before it without fear of personal liability.

The fact that a judicial act performed under such grant of jurisdiction had not been proscribed by statutory or judicial fiat would be no guarantee that jurisdiction would subsequently be found to have existed. Rather, the court below would require that judges under such circumstances proceed at their own risk unless in addition to the grant of general jurisdiction some specific and affirmative legislative or judicial indication of authority may be found. Presumably, where the authorities were silent as to the court's jurisdiction, no jurisdiction would exist. Such reasoning is the sort of judicial sophistry which is employed when a given Judge wishes to reach a desired conclusion and does so, ignoring the principles of judicial precedent and carelessly creating the unsettling and chilling effect which the decision, if allowed to stand, will have upon the judiciary of the nation. Such decision would undermine the important public considerations which are the very basis for the recognition of judicial immunity. This Court is therefore called upon to reaffirm



once again those standards for judicial immunity which have been enunciated in its prior decisions and cited herein.

## CONCLUSION.

It is of the utmost importance to the Judicial System functioning in the State and Federal Courts of the United States that Circuit Court Judges retain the protection of the doctrine of judicial immunity as set forth in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.* The Opinion of the Circuit Court of Appeals, in refusing to grant Judge Harold D. Stump the immunity provided under said doctrine as enunciated, erodes the clarity of the doctrine to such an extent that resolution by the United States Supreme Court is required.

Respectfully submitted,

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,
*Counsel for Petitioner Harold D. Stump.*

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
219-423-9551,
*Counsel for Petitioners, John H. Hines, M.D., Harry M. Covell, M.D., and Warren G. Sunday.*

# APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Fort Wayne Division

LINDA KAY SPARKMAN, ET AL., *Plaintiffs,*
*vs.*
ORA E. MCFARLIN, ET AL., *Defendants.*
} Civil No. F 75-129.

## MEMORANDUM OF DECISION AND ORDER.

This cause is now before the court on various Rule 12(b) motions[1] seeking dismissal for want of jurisdiction and for failure to state a claim upon which relief can be granted. For reasons given below, the motions will be granted for the reason that the actions complained of violate no federal constitutional guarantees.

The allegations of plaintiffs' complaint may be summarized as follows: when plaintiff Linda Kay Sparkman was 15, in 1971, her mother decided that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for

1. Motion by defendant Stump to dismiss, filed Dec. 18, 1975, on the grounds that no state action is involved, on the grounds of judicial immunity, and on the grounds that plaintiff Leo Sparkman is without standing; motion by defendants Hines, Covell and Sunday to dismiss, filed Jan. 13, 1976, on the grounds of no state action; and motion by defendants Harvey and DeKalb Memorial Hospital to dismiss, filed Feb. 17, 1976, on the grounds of no state action; insufficiency of the allegations as to unequal treatment, conspiracy, and intent to discriminate; statute of limitations; and want of jurisdiction.

this decision were that, according to her mother, Linda was "somewhat retarded," that without her mother's consent or knowledge Linda had allegedly taken up dating and staying overnight with older youths and men, and that her mother was unable to maintain continuous control and observation over Linda to "prevent unfortunate circumstances." Consequently, her mother (defendant Ora McFarlin) sought the services of an attorney, defendant Warren Sunday, who prepared a certain "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement." By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This petition was thereafter presented to the Hon. Harold Stump, Judge of the Circuit Court of DeKalb County, Indiana, defendant herein, who "approved" the ex parte application.

Linda was then taken to the DeKalb Memorial Hospital. She had recently been treated there by defendant John Hines, M.D., for an attack of appendicitis. Linda was told that her trip to the hospital was the purpose of surgically removing her appendix. Instead, the real purpose of placing Linda in the hospital was to have the tubal ligation performed. On July 16, 1971, Dr. Hines performed the ligation. Defendant John Harvey was the anaesthesiologist, and Dr. Harry Covell, defendant, assisted in the operation.

From that time until late in 1973, Linda was not told that she had been sterilized. During that time she married plaintiff Leo Sparkman. It appears that some of the defendants continued to deny that a sterilization had been performed after some had admitted it, and that Linda's inability to have children has caused a rift in her marriage. Plaintiffs assert that they were finally informed by Dr. Hines in May, 1975 that the tubal ligation had been performed.

Plaintiffs assert a cause of action arising under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to



the Constitution and under 42 U.S.C.A. §§ 1983 and 1985(3), with jurisdiction laid under 28 U.S.C.A. §§ 1331 and 1343. Declaratory relief is sought pursuant to 28 U.S.C.A. §§ 2202-03.

Whether laid under section 1331 or 1343(3), and whether asserted directly or via section 1983 and 1985, plaintiffs' grounds for recovery are asserted to rest on the violation of constitutional rights. Plaintiffs urge that defendants violated the following constitutional guarantees:

1. that the actions were "arbitrary and thus in violation of the due process clause of the Fourteenth Amendment;

2. that Linda was denied procedural safeguards required by the Fourteenth Amendment;

3. that the sterilization was permitted without the promulgation of standards;

4. that the sterilization was an invasion of privacy;

5. that the sterilization violated Linda's right to procreate;

6. that the sterilization was cruel and unusual punishment;

7. that the use of sterilization as punishment for her alleged retardation or lack of self-discipline violated various constitutional guarantees;

8. that the defendants failed to follow certain Indiana statutes, thus depriving Linda of due process of law; and

9. that defendants violated the equal protection clause, because of the differential treatment accorded Linda on account of her sex, marital status, and allegedly low mental capacity.

Linda also seeks to assert pendent state claims of assault and battery and medical malpractice against the relevant defendants. Plaintiff Leo Sparkman asserts a pendent state claim for loss of potential fatherhood.

Whether brought under 42 U.S.C.A.§§ 1983 or 1985, with jurisdiction laid under 28 U.S.C.A. §1343, or brought under the Fourteenth Amendment directly with jurisdiction under 28 U.S.C.A. § 1331, the existence of a cause of action in this case depends on whether the complaint shows that rights protected by the Fourteenth Amendment have been violated by any of the defendants. The first concern "should be whether a constitutional duty derived from the Fourteenth Amendment has been breached." Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 23 (1974), *quoted in Bonner* v. *Coughlin*, 517 F.2d 1311, 1318 n.21 (7th Cir. 1975) (per Stevens, J.). Stated another way, the threshold question under the Fourteenth Amendment is whether the duties imposed by that amendment run only against the state, or whether they run against private individuals as well: "[T]he distinction between the two kinds of state involvement that may be relevant in civil rights litigation—first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal right is merely assertable against the State—requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment." *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 829 (7th Cir. 1975) (per Stevens, J.).

In appraising the claimed constitutional violations, the court holds that each reflects a right which is assertable only against state conduct. The Fourteenth Amendment does not protect against arbitrary decisions by private individuals; it does not impose procedural safeguards upon purely private decision-making processes; it does not require that purely private decision-making proceed from promulgated standards; it does not protect against invasions of one's privacy by purely private actions; it does not safeguard as against private acts a woman's right to procreate; it does not proscribe "punishment," whether cruel or unusual, brought about by purely private conduct; it does not prevent purely private action that "punishes" a person be-



cause of her mental condition; it does not impose a duty upon private individuals to obey the laws of the state; and it does not require that private individuals refrain from discrimination or unequal treatment of classes of persons. The rule may be otherwise when state action is involved; thus, at the threshold, plaintiffs must show that state action was in fact involved in a manner that contributed to her alleged injuries, else no claim is made out under the Fourteenth Amendment.[2]

It is therefore necessary to determine what conduct, if any, may be considered to be an act of the State of Indiana, upon which plaintiffs might found their claims of state action. The actions of the private attorney who advised Mrs. McFarlin and who prepared the legal papers for presentation to Judge Stump are not actions of the State of Indiana. *Cf. Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904 (1963); *Jones* v. *Jones*, 410 F.2d 365, 366 (7th Cir. 1969) and cases there cited, *cert. denied*, 396 U.S. 1013 (1970).

Nor may the acts of the private physicians and anaesthesiologists, or those of the hospital in which the operation was performed, be considered to be acts of the State of Indiana. *Cf. Byrne* v. *Kysar*, 347 F.2d 734, 736 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

The only state action involved was that of Judge Stump, as Judge of the DeKalb Circuit Court, Indiana, in "approving" Mrs. McFarlin's petition. Plaintiffs seek to hold the private defendants liable on a theory that they conspired with Judge Stump to bring about the allegedly unconstitutional acts. 42 U.S.C.A. §§ 1983, 1985. If, however, Judge Stump is immune from suit, and no other state action can be shown,[3] no action will lie.

---

2. Plaintiffs' contention to the contrary, relying on certain language in Griffin v. Breckenridge, 403 U.S. 88 (1971), has been fully considered and rejected in *Cohen, supra.*

3. Plaintiffs appear to assert an additional ground for finding "state action" the application of Ind. Code § 16-8-3-1 (Burns 1973). This statute authorizes a legal guardian to give consent for surgery or medical treatment on behalf of an incompetent person or minor.

(Footnote continued on next page.)

*See, e.g., Grow* v. *Fisher*, 523 F.2d 875, 877 (7th Cir. 1975); *Hansen* v. *Ahlgrimm*, 520 F.2d 768, 770 (7th Cir. 1975); *Guedry* v. *Ford*, 431 F.2d 660, 664 (5th Cir. 1970).

Except where there is a "clear absence of all jurisdiction over the subject-matter," *Bradley* v. *Fisher*, 80 U.S. 646, 651 (1871), a judge is entitled to complete immunity to suit based upon his official acts. *Pierson* v. *Ray*, 386 U.S. 547 (1967). "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler* v. *Pachtman*, 96 S.Ct. 984, 989 n.13 (1976). *Cf. Spires* v. *Bottorff*, 317 F.2d 273, 274-75 (7th Cir. 1963).

The allegedly wrongful acts committed by Judge Stump consisted solely in his approval of the petition filed in his court by defendant McFarlin. The circuit courts of Indiana are courts of general jurisdiction, having "original exclusive jurisdiction in all cases at law and in equity whatsoever." Ind. Code § 33-4-4-3 (Burns 1975). There is *jurisdiction* in such a court to hear petitions for tubal ligation, *cf. A.L.* v. *G.R.H.*, 325 N.E.2d 501 (Ind. App. 1975) (by implication), although the court there held that on the merits the sterilization could not be thus consented to. But whether or not Judge Stump's "approval" of the petition may in retrospect appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and to act thereon. Accordingly, Judge Stump is clothed with absolute judicial immunity, and neither he nor his alleged coconspirators may be held liable under sections 1983, 1985 or under the Fourteenth Amendment.

(Footnote continued from preceding page.)
It is alleged that this statute unconstitutionally authorized the surgery performed here. However, the court order entered by Judge Stump did not rely on this provision; the statute does not authorize tubal ligations, *see* A. L. v. G.R.H., 325 N.E.2d 501 (Ind. App. 1975); and in any event such a statute, being declarative of the common law, will not provide the necessary state action for a Fourteenth Amendment violation. *Cf.* Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); Gibbs v. Teitelman, 502 F.2d 1107 (3d Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974).



*Wade* v. *Bethesda Hosp.*, 337 F. Supp. 671, 356 F. Supp. 380 (S.D. Ohio 1971, 1973) is not to the contrary. There, a probate judge acting under a specific statute conferring jurisdiction to order sterilizations was held to have no immunity, where the special statute conferring jurisdiction had been repealed at the time the judge ordered the sterilization to be performed. No such limited jurisdiction is in issue in this case.

Since it appears that plaintiffs have no constitutional claims which can be asserted against the defendants, defendants' motions to dismiss the first and fourth causes of action of plaintiffs' complaint will be granted.

Plaintiffs' remaining claims are for medical malpractice, assault and battery, and loss of potential fatherhood. It appears that these claims rest wholly on state law grounds, with jurisdiction said to lie under the pendent jurisdiction of the court. However, since all federal claims must be dismissed, there is no longer existing the necessary federal grounds for jurisdiction from which the state law claims may be said to be pendent. Accordingly, the remainder of plaintiffs' claims will be dismissed for lack of subject matter jurisdiction, Rule 12(b)(1), Fed. R. Civ. P. The dismissal of the state law claims is without prejudice to plaintiffs' rights under Indiana's Journey's Account Act, Ind. Code § 34-1-2-8 (Burns 1973); *see Eves* v. *Ford Motor Co.*, 281 N.E.2d 826 (Ind. App. 1972).

ORDER.

Accordingly, defendants' motions to dismiss are granted, and plaintiffs' first and fourth causes of action are hereby dismissed for failure to state a claim upon which relief can be granted; and the remaining claims are dismissed for lack of jurisdiction over the subject matter.

Entered this 13th day of May, 1976.

/s/ JAMES E. ESCHBACH
*United States District Judge*

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1706

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Plaintiffs-Appellants,*

*vs.*

ORA E. MCFARLIN, WARREN G. SUNDAY, HAROLD D. STUMP, individually and as Judge of the Circuit Court of DeKalb County, Indiana, JOHN H. HINES, M.D., JOHN C. HARVEY, M.D., HARRY M. COVELL, M.D., and DEKALB MEMORIAL HOSPITAL, INC., a corporation,
*Defendants-Appellees,*

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. F 75-129-C—Jesse E. Eschbach, *Judge.*

ARGUED JANUARY 14, 1977—DECIDED MARCH 23, 1977

Before SWYGERT, WOOD, *Circuit Judges* and EAST, *Senior District Judge.**

SWYGERT, *Circuit Judge.* The question on appeal is whether a state court judge who ordered the sterilization of a fifteen-year-old girl is judicially immune from liability under the federal civil rights statutes. We hold that the judge acted extrajudicially and that the doctrine of judicial immunity is inapplicable to this case. The district court's judgment of dismissal of the complaint is reversed.

* Senior District Judge William G. East of the District of Oregon is sitting by designation.



I.

In 1971 defendant Ora E. McFarlin sought a court order to have her fifteen-year-old daughter Linda Sparkman, plaintiff, sterilized. Defendant Warren G. Sunday, an attorney, prepared the "Petition to Have Tubal Ligation Performed on a Minor and Indemnity Agreement." The petition contained an affidavit by McFarlin which stated that Linda was "somewhat retarded" although she attended public schools and had been "passed along with other children in her age level." McFarlin further alleged that, without her knowledge or consent, Linda had begun dating and staying overnight with older youths and men, and that she could not maintain a continuous observation over Linda to "prevent unfortunate circumstances." The petition was presented to defendant Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, who issued the requested order in an ex parte proceeding. No guardian ad litem was appointed to represent Linda's interests and no hearing was held. Linda received no notice of the petition, and neither the petition nor the order was ever filed in the DeKalb County Circuit Court.

After Judge Stump had signed the order, Linda was taken to the DeKalb Memorial Hospital, and a tubal ligation was performed by defendant John H. Hines, M.D., Defendant Harry M. Covell, M.D., assisted in the operation and defendant John C. Harvey, M.D., was the anaesthesiologist. Linda was not informed of the true consequences of the surgery; in fact, she was told that the purpose of the hospital visit was to have her appendix removed.

In 1973 Linda married plaintiff Leo Sparkman. Two years later she learned for the first time (from Dr. Hines) that she had been sterilized. The couple brought an action seeking damages under 42 U. S. C. §§ 1983 and 1985(3), contending that the actions of the defendants in sterilizing her or causing her to be sterilized violated her constitutional rights. She attached pendent state claims for assault and battery and medical mal-

practice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The district court granted defendants' motions to dismiss the federal claims. It found that the only state action present, necessary to the federal claims, was the approval of the petition by Judge Stump. It then held that Judge Stump was "clothed with absolute judicial immunity" so that neither he nor any of the other defendants, alleged to be coconspirators, were liable under sections 1983, 1985(3) or the Fourteenth Amendment. The remaining state claims were dismissed for lack of subject matter jurisdiction as they were pendent to the federal causes of action.

II.

The doctrine of judicial immunity was adopted by the Supreme Court in *Bradley* v. *Fisher*, 80 U.S. 335 (1871), and was held applicable to actions brought under 42 U. S. C. § 1983 in *Pierson* v. *Ray*, 386 U.S. 547 (1967). Its purpose is to permit judges to exercise their judicial function independently, without fear of civil liability. It is available even where malicious or corrupt action on the part of a judge is alleged.

Judicial immunity is available, however, only where the judge has jurisdiction. *Bradley* v. *Fisher, supra; Pierson* v. *Ray, supra.* The jurisdiction required by *Bradley* is that over the subject-matter; that is, the power of a court to hear and decide a cause of action before it. Although immunity exists when jurisdiction is present even though the judge acts in excess of that jurisdiction, it is not available when he acts in "clear absence of all jurisdiction." *Bradley*, 80 U.S. at 351. Thus, the crucial issue here, upon which immunity turns, is whether Judge Stump acted within his jurisdiction when he approved the petition to have Linda Sparkman sterilized.



In approving the petition, Judge Stump cited no statutory or common law authority under which he was purporting to act.[1] Moreover, counsel has not during the course of this litigation cited any specific statutory or common law basis under which a court can order the sterilization of a child simply upon the petition of a parent.

Defendant Stump rests his argument that he had jurisdiction in this case on Indiana Code 33-4-4-3, which is a general grant of jurisdiction to the circuit courts.[2] It confers original jurisdiction "in all cases at law and in equity. . . ." Although this grant of juridical power is broad, we cannot accept the assertion that it cloaks an Indiana circuit judge with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or equity in order to come within the statute. In short, it must have a statutory or common law basis.

---

1. His order, dated the same day as the petition, reads:

   I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

2. Indiana Code 33-4-4-3 provides:

   Jurisdiction. Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases an action for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon Justices of the Peace. It shall also have exclusive jurisdiction of the settlement of decedent's estates and of guardianships: provided, however, that in counties in which Criminal or Superior Courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such Appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer. [Acts 1881 (Special Session), Chapter 24, Section 3, page 102.]

We agree with plaintiffs, based on an independent examination of Indiana law, that there was no statutory authority for Judge Stump's actions. The statutory scheme in existence at the time in fact negated his right to assert any jurisdiction over the petition. In 1971 Indiana Code sections 16-13-13-1 through 16-13-13-4 were in effect.[3] These statutes authorized sterilization of institutionalized persons under certain circumstances. Those circumstances involve specific procedures to be followed, including the right to notice, opportunity to defend, and the right to appeal. This statutory scheme clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed. *See Kemp* v. *Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Smith* v. *Command*, 231 Mich. 409, 204 N.W. 140, 146 (1925).

In addition, jurisdiction for a court to order sterilization cannot be found in the common law of Indiana. It is argued on behalf of the defendants that the Indiana Court of Appeals implied that such jurisdiction exists in *A.L.* v. *G.R.H.*, 325 N.E. 2d 501 (Ind. Ct. App. 1975). Aside from the fact that *A.L.* was decided after Judge Stump acted, it undercuts rather

3. Indiana Code 16-13-13-1 provides:

> Authorization. Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feebleminded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeblemindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1–16-13-13-6.]

Section 16-13-13-2 sets out the procedures to be taken in such a case. Section 16-13-13-3 and section 16-13-13-4 provide for appeals.



than supports his position. The court in *A.L.* affirmed the trial court's denial of a declaratory judgment authorizing a parent to consent to the sterilization of a minor child. If the opinion implies anything, it is that no jurisdiction to order sterilizations exists. This view is supported by the fact that the cases cited by the *A.L.* court all held that, in the absence of express statutory authority, courts lack the power to order sterilizations.[4]

Moreover, the defendants can derive no comfort from the common law of other states. In general, courts have refused to order the extreme remedy of sterilization absent specific legislative authority, holding that it was not within their common law powers. *See Holmes* v. *Powers*, 439 S.W. 2d 579 (Ky. Ct. App. 1968); *Frazier* v. *Levi*, 440 S.W. 2d 393 (Tex. Ct. Civ. App. 1969); *In Interest of M.K.R.*, 515 S.W. 2d 467 (Mo. 1974); *Kemp* v. *Kemp*, *supra*.[5]

Given the fact that the purported judicial action of defendant Stump had no support in statute or previous common law, Judge Stump could only claim to be acting lawfully if the remedy of sterilization that he imposed was a valid exercise of

4. *Frazier* v. *Levi*, 440 S.W. 2d 393 (Tex. Ct. Civ. App. 1969); *Holmes* v. *Powers*, 439 S.W. 2d 579 (Ky. Ct. App. 1968); *In Interest of M.K.R.*, 515 S.W. 2d 467 (Mo. 1974); *Kemp* v. *Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

5. In some of these cases the facts which might have warranted sterilization were quite compelling, which cannot be said of those in the instant case. For example, in *Frazier* v. *Levi*, *supra*, the subject was an adjudged incompetent woman, 34 years old with the mentality of a six-year-old. She was the ward of her parents, who were also supporting her two illegitimate children, both retarded. The parents claimed that they could not bear the economic burden of any more children. The court found it could not authorize sterilization absent statutory or constitutional authority.

The only recent case permitting such action by a court without specific statutory authority was *In re Simpson*, 180 N.E. 2d 206 (Ohio Prob. 1962). In that case, statutory authority was found by construing a section providing that when mental institutions were overcrowded, a probate judge could take such action as he deems necessary for the health and welfare of the feeble-minded. The validity of that decision is questionable, however, considering the subsequent decision in *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671, 356 F. Supp. 380 (S.D. Ohio 1971, 1973).

the power of courts to fashion new common law.[6] We hold that it was not. Although courts ought not to be discouraged from creating innovative legal remedies to meet changing social conditions, they may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate. If we were to say that jurisdiction existed to order sterilization without adherence to the requirements of institutionalization and procedural due process mandated by the Indiana legislature, we would be sanctioning tyranny from the bench. There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take.[7]

Even if defendant Stump had not been foreclosed under the Indiana statutory scheme from fashioning a new common law remedy in this case, we would still find his action to be an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's allegations or to have a higher court examine whether the substance of those allegations, even if true, warranted her sterilization. Finally, the petition and order were never filed in court. This kind of purported justice does not fall within the categories of cases at law or in equity.

---

6. This claim was never asserted in defendants' briefs or at oral argument.

7. There are other examples of extreme and unauthorized remedies not distinguishable from the present case. If Judge Stump were said to be acting validly under the power of courts to create new common law, a judge of general jurisdiction could order, upon an affidavit and petition similar to the one in the instant case, that a United States citizen should be disenfranchised because he is "un-American." Clearly such a remedy would be beyond the judge's general jurisdiction.



Thus, Judge Stump's action had no basis either in law or in equity and was therefore taken without jurisdiction. In the absence of jurisdiction, a judge is not entitled to judicial immunity in a suit for damages that resulted from his action.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Supreme Court, U. S.
FILED
JUL 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1976**

---

**Number 76-1750**

---

Ora E. McFarlin, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D. and DeKalb Memorial Hospital, Inc.,
*Petitioners.*

-vs-

Linda Kay Sparkman and Leo Sparkman,
*Respondents.*

---

## BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

THEODORE L. SENDAK
*Attorney General of Indiana*

DARREL K. DIAMOND
*Assistant Attorney General*

*Attorneys for State of Indiana*

Offices of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4725

Central Publishing Company, Inc., Indianapolis, Ind. 46206

## TABLE OF CONTENTS


*Page*

Table of Authorities ..... ii

Consent of The Parties ..... 1

Interest of The Amicus ..... 2

Argument

A. The Doctrine of Judicial Immunity ..... 3

B. The Indiana Court System ..... 4

C. Subject Matter Jurisdiction ..... 6

D. Standard For Consideration of the Complaint 11

Conclusion ..... 13

## TABLE OF AUTHORITIES


*Cases:* *Page*

*A.L. v. G.R.H.*, — Ind. App. —, 325 N.E.2d 501 (1975) 10

*Bell v. Hood*, 327 U.S. 678 (1946) ..... 10

*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872) ..3, 4, 7, 11

*Farley v. Farley*, 157 Ind. App. 385 (1973) ..... 8, 9

*Harris v. Souder*, 233 Ind. 287 (1954) ..... 6

*Hicks v. State*, 249 Ind. 24 (1967) ..... 6

*J. I. Case Company v. Sandefur*, 245 Ind. 213 (1964) .. 8

*Mt. Healthy City School District v. Doyle*, —U.S. —, 97 S.Ct. 568 (1977) ..... 9

*National League of Cities v. Usery*, — U.S. —, 96 S.Ct. 2465 (1976) ..... 5

*Noblesville City Planning Commission v. Gatewood*, 134 Ind.App. 609 (1963) ..... 9

*Pierson v. Ray*, 386 U.S. 547 (1967) ..... 3, 4

*Smith v. Indiana State Board of Health*, — Ind. App. —, 303 N.E.2d 50 (1973) ..... 8

*State ex rel Egan v. Wolever*, 127 Ind. 306 (1891) ....3, 7, 9

*Constitutional and Statutory Provisions:*

United States Constitution, Amendment Ten ..... 5

42 U.S.C. § 1983 ..... 3

Indiana Code (I.C.) 33-4-1-1 *et seq* ..... 5

IC 33-4-4-3 ..... 6

IC 33-8-1-9 ..... 5




## TABLE OF AUTHORITIES—continued


*Constitutional and Statutory Provisions:—cont'd.* *Page*

IC 33-9-1-4 ..... 5

IC 33-12-2-1 ..... 6

IC 33-12-2-2 ..... 6

IC 33-12-2-3 ..... 5

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1976**

---

**Number 76-1750**

---

Ora E. McFarlin, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D. and DeKalb Memorial Hospital, Inc.,
*Petitioners.*

-vs-

Linda Kay Sparkman and Leo Sparkman,
*Respondents.*

---

## BRIEF OF THE STATE OF INDIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, by Darrel K. Diamond Assistant Attorney General, pursuant to Rule 42 of this Court, submits its *amicus curiae* brief in support of the Petitioners in this cause.

### Consent of the Parties

This brief is filed by the State of Indiana pursuant to Rule 42 of this Court. Consent of the parties is not required pursuant to Rule 42(4).

## Interest of the Amicus

The interest of the State of Indiana in the determination of the question presented in this case is twofold. First, the State of Indiana has an interest in the ability of judges of courts of the State of Indiana to determine matters presented to them free from the harassment of vexatious litigation. Second, and more important is the interest of the State of Indiana in maintaining its right to define and establish the jurisdiction of its own courts. The action of the United States Court of Appeals in this action would appear to make the determination of the jurisdiction of state courts a matter of federal law, at least insofar as the determination of that jurisdiction is involved with the invocation of judicial immunity by state court judges in actions against them in federal courts.

## ARGUMENT

### A.

### The Doctrine of Judicial Immunity.

The doctrine of judicial immunity may be considered one of the most firmly settled doctrines of Anglo-American common law. This Court definitively stated and adopted the doctrine in *Bradley v. Fisher,* 80 U.S. (13 Wall) 335 (1872). The applicability of the doctrine to cases under the federal civil rights statutes, specifically 42 U.S.C. § 1983, was noted and the doctrine was reaffirmed in *Pierson v. Ray,* 386 U.S. 547 (1967). It was noted in *Bradley v. Fisher* that the absence of such immunity

> ". . . would destroy that independence without which no judiciary can be either respectable or useful." 80 U.S. at 347.

It was also noted that the doctrine has been recognized throughout the history of the common law. The leading Indiana case on the subject, *State ex rel. Egan v. Wolever,* 127 Ind. 306 (1891), traces the rule to the Year Books of the early kings of England. 43 Edw. III, 9; 9 Edw. IV, 3; cited at 127 Ind. at 311.

The opinion of the United States Court of Appeals for the Seventh Circuit in this case purports to uphold the doctrine while finding this case to be outside its scope. That determination of scope, however, is clearly erroneous and would act to totally destroy the immunity.

The scope of the immunity was held by this Court in *Bradley v. Fisher* and *Pierson v. Ray* to extend to the point of the full subject matter jurisdiction of the defend-

ant judge. Only a clear absence of all jurisdiction over the subject matter of the action would result in the denial of the immunity. 80 U.S. at 351-353; 386 U.S. at 554. While the Court of Appeals purported to find a total lack of subject matter jurisdiction, the opinion of that Court shows merely that the action of the defendant Judge Stump was considered erroneous and that the result was one that the judges of the Court of Appeals strongly disagreed with on policy grounds. It is suggested that the basis of the Court of Appeals opinion is its statement that:

> "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take." Pet. for Writ, p. A14.

The equation of the Court of Appeals that error is the same as a clear lack of subject matter jurisdiction is ample reason for reversal of that decision and reinstatement of the order of dismissal of the District Court. The existence of such an opinion, however, would appear to be reason for this Court to examine more closely the standard of clear absence of general subject matter jurisdiction.

## B.

## The Indiana Court System.

In this case, the judge of a state court was sued in federal court for actions which were asserted by the defendant judge to have been within the scope of his judicial power. Since the standard for determination of the privilege is that of subject matter jurisdiction, the federal court must determine the question of the scope of jurisdiction of the State Court. The State of Indiana would assert most strongly that such determination must be made as a question of state and not federal law. Basic principles



of federalism and comity would require such a result. Such result is also demanded by recognition that the states retain some measure of sovereignty within our federal system. This Court has recognized that certain powers are reserved to the states under the Tenth Amendment which may not be interfered with by the federal government. *National League of Cities v. Usery*, — U.S. —, 96 S.Ct. 2465 (1976.) The determination of the jurisdiction of the courts within the state judicial system must surely be one of those reserved rights. A brief sketch of the Indiana judicial system is therefore set out for the convenience of this Court.

The basic trial court unit of the Indiana judicial system is the Circuit Court. This case involves a Circuit Court. The State of Indiana is divided into eighty-eight (88) judicial circuits. Eighty-four (84) of these consist of one county; the remaining four (4) consist of two counties each. Indiana Code, 33-4-1-1, *et seq.* As the population and caseload of a county increases to the point that the single Circuit Court is insufficient, additional courts are created by individual statute. These may include Superior Courts, Probate Courts, Criminal Courts, and Juvenile Courts as separate entities. The scope of jurisdiction of these courts is set out in those creating statutes. Ordinarily these additional courts share judicial power concurrently with the Circuit Court. In some cases, however, these courts are given exclusive jurisdiction so as to decrease the jurisdiction of the Circuit Court. In the most populous county, Marion County (Indianapolis), for example, the jurisdiction of the Circuit Court is limited by grants of exclusive jurisdiction to a Probate Court, Criminal Court and Juvenile Court. Indiana Code, 33-8-1-9, 33-9-1-4, 33-12-2-3. There are no such additional courts, however, in DeKalb County, from which this action arose.

It should be noted that each county has a Juvenile Court, but in counties with less than 250,000 population, the Circuit Court and judge fulfill the function of the Juvenile Court and judge. Indiana Code, 33-12-2-1, 33-12-2-2. It was held in the case of *Harris v. Souder,* 233 Ind. 287 at 291 (1954), that the Circuit Court judge when exercising juvenile jurisdiction was not acting as judge of a separate court. That case was later overruled to the extent that it would allow the court to deny an offender found to be a juvenile the right to have his case transferred to the Juvenile Court for a full and formal determination of whether the case should be waived back for trial of the defendant as an adult. *Hicks v. State,* 249 Ind. 24 at 29 (1967). That holding in *Hicks,* however, would not appear to be a total overruling of the proposition that the Circuit Court and Juvenile Court, in counties of less than 250,000 population, are not separate entities, but that the latter is a jurisdiction within the former.

For purposes of this brief, it is not necessary to consider the appellate system or the system of courts of limited misdemeanor and small claims jurisdiction Insofar as relevant to this case, the Circuit Court of DeKalb County was the sole general jurisdiction court. As such its jurisdiction is that set forth in Indiana Code 33-4-4-3 (set out in full in the Petition for Writ of Certiorari at p. 5), which is "original exclusive jurisdiction in all cases at law and in equity whatsoever."

## C.

## Subject Matter Jurisdiction

It must then be considered what the term "subject matter jurisdiction" means. For purposes of judicial immunity,



determinations of a defendant judge as to the presence or lack of jurisdiction should be viewed liberally in favor of a finding that jurisdiction exists. Any lack of jurisdiction, to defeat the immunity, must be clear and obvious.

> "Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised." *Bradley v. Fisher, supra* 80 U.S. at 352.

The example used in *Bradley* was that if a probate court judge, whose jurisdiction is limited to wills and decedents' estates, should attempt to judicially punish persons for violation of criminal laws, then there would be no immunity. But the judge of a court having criminal jurisdiction would be immune if he were to try a defendant for an act which was not a crime or impose a penalty greater than allowed by law. *Ibid.*

That question of the meaning of subject matter jurisdiction was considered in the context of judicial immunity and as a matter of Indiana law in the leading case of *State ex rel. Egan v. Wolever, supra.* It was there stated:

> "Where a court of limited jurisdiction has, in a given case, jurisdiction of the subject-matter, and of the persons interested, the same immunity is accorded to the judge, or magistrate, that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark, that by jurisdiction of the subject-matter is not meant simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs . . . In the latter case it is said that by subject-matter is meant the abstract thing and not the particular case.

> It is said that in courts of general jurisdiction, an action never lies against the judge because he has jurisdiction of all causes." 127 Ind. at 315.

Thus, the nature of the case is not a grounds for holding that a court of general jurisdiction lacks subject matter jurisdiction so as to subject a judge to liability. It was noted, however, that it was possible for a court of general jurisdiction to lack jurisdiction in certain circumstances. The examples given are that of a judge purporting to act after the case was concluded or after a change of venue was taken.

These examples given are of questionable authority today in light of later decisions of Indiana courts, however. In *Smith v. Indiana State Board of Health,* — Ind. App. —, 303 N.E. 2d 50 at 53, the Indiana court noted that even though a proper motion for change of venue deprives the court in which it is filed of further jurisdiction, yet some vestige of jurisdiction is retained to decide any necessary interlocutory matters. In *J.I. Case Co. v. Sandefur,* 245 Ind. 213 at 217, it was alleged that the trial court had lost jurisdiction upon the death of the original plaintiff since the action was not covered by the statute on survival of actions. It was there held:

> "So long as a court has general jurisdiction of the subject matter to which a case belongs, a defendant may waive his right to object to the jurisdiction by failing to make timely and specific objections thereto."

In the case of *Farley v. Farley,* 157 Ind. App. 385 at 395-399, it was argued that the allowance of attorney fees and litigation expenses 149 days after the entry of the divorce decree was void because the time for such modification of the decree had passed. The Indiana court ruled



that such matters were not questions of subject matter jurisdiction. The trial court had power to act in divorce actions as a class, therefore the bar to the specific action of the trial court was not one involving general subject matter jurisdiction and was valid because no timely objection had been made. 157 Ind. App. at 398.

It may be noted that this Court recently refused to consider an issue of subject matter jurisdiction which was not timely raised. It was noted that the issue "is not of the jurisdictional sort which the Court raises on its own motion." *Mt. Healthy City School District v. Doyle,* — U.S. —, 97 S.Ct. 568 at 572 (1977). Yet federal courts are not courts of general jurisdiction but of limited jurisdiction. It would thus appear that such jurisdictional bars are not of the force that they were at the time of the decision of the *Wolever* case.

Returning to the basic question of subject matter jurisdiction, it is noted that under Indiana law, jurisdiction is of two types, although these are sometimes confused in opinions. The general power over a class of cases is subject matter jurisdiction. Jurisdiction of the particular case deals with the right to entertain a particular case within that class of cases. *Farley v. Farley, supra.* Only the general subject matter jurisdiction is involved for considerations of judicial immunity.

It is also essential to distinguish between subject matter jurisdiction in the broad sense relevant to judicial immunity and the issue of failure to state a claim.

> "The question of jurisdiction of the subject matter is not dependent upon the validity of the demands set forth in the complaint nor upon the sufficiency of the allegations thereof." *Noblesville City Plan Commission v. Gatewood,* 134 Ind. App. 609 at 612 (1963.)

That distinction is also the law of the federal courts. As stated in *Bell v. Hood,* 327 U.S. 678 at 682 (1946):

> "For it is well settled that the failure to state a proper cause of action calls for a judgement on the merits and not for a dismissal for want of jurisdiction."

The case of *A.L. v. G.R.H.*, — Ind. App. —, 325 N.E. 2d 501 (1975), has been treated as of major significance throughout this case. In that decision, the Indiana courts ruled in a declaratory judgment action that a parent had no common law right to have his or her child permanently and involuntarily sterilized. That ruling, it is asserted by the State of Indiana, did not specifically decide any question of subject matter jurisdiction, except that it gives rise to an inference that subject matter jurisdiction exists, as noted by the District Judge. Pet. for Writ at A6. The question there was whether there was a legal right to do so, not whether a court had jurisdiction to decide the issue. Indeed, in that case the Indiana courts did decide the issue, thus necessarily assuming that there was jurisdiction to do so. Despite the opinion of the Court of Appeals in this case, it cannot be considered to be the law that a court has jurisdiction if it reaches the right decision but lacks jurisdiction if it reaches the wrong decision. That question is one of failure to state a claim rather than of jurisdiction.

The references in *A.L. v. G.R.H.* to circumstances under which such sterilization could be done is an indication that an Indiana court of general jurisdiction does has subject matter jurisdiction to consider whether there is a legal right to consider whether a parent may bring about the involuntary sterilization of the child. The erroneousness of the decision reached has never been a factor which would deny judicial immunity.



**D.**

**Standard for Consideration of the Complaint.**

This case was decided in the District Court upon a Motion to Dismiss. The general rule is that such a motion alleging failure to state a claim upon which relief may be granted admits *arguendo* all the allegations of fact contained in the Complaint. That standard appears inconsistent with the rule in judicial immunity cases that immunity cannot be defeated by mere allegations of wrongdoing and that determinations of jurisdiction by the defendant judge in the prior action giving rise to the further litigation will be viewed in a favorable light. It should be noted that in *Bradley v. Fisher, supra,* one of the major issues was whether the immunity would be defeated if it were determined that the defendant judge had acted maliciously or corruptly. It was held that such allegations in a Complaint were of no avail.

> "Few persons sufficiently irritated to institute an action against a judge for his official acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action." 80 U.S. at 348.

In this case, for example, the opinion of the Court of Appeals notes and appears to place some weight upon what is stated as the fact that the petition for involuntary sterilization and judicial approval were never filed in court. If the truth of that allegation were to be grounds for deter-

mining the availability of judicial immunity*, then the conflict would be clear. The purpose of judicial immunity is to insure independent and principled decision making by judges free from the pressure and harassment of vexatious litigation. That purpose would be thwarted to the extent that allegations of procedural error would be allowed to defeat the protection given to judges in carrying out their vital functions.

---

*Such a matter should not be considered vital, but merely as one piece of circumstantial evidence as to whether the judge had been acting in a judicial capacity in acting as he did. In this case, it would be difficult to imagine any reason for the parties to act as they did if Judge Stump's actions were not a judicial determination. Making the act of filing to be central would create the possibility that a judge would be found liable because of the failure of a clerk to perform a ministerial duty.



## CONCLUSION

For the foregoing reasons, the State of Indiana as *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari in this case.

Respectfully submitted,

THEODORE L. SENDAK
*Attorney General of Indiana*

DARREL K. DIAMOND
*Assistant Attorney General*

*Attorneys for State of Indiana*

Offices of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-4725

FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977.

## No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*VS.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 9, 1977 CERTIORARI GRANTED OCTOBER 3, 1977.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977.

---

**No. 76-1750**

---

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*vs.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

## INDEX TO APPENDIX.


| | PAGE |
|---|---|
| Docket Sheet | A1 |
| Complaint | A8 |
| Defendants' Answers and Motions to Dismiss | A18 |
| Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement | A25 |

## APPENDIX

| Date | NR | Proceedings |
|---|---|---|
| 11/26/75 | 1 | Complaint filed. Summons issued and mailed to Marshal. ww |
| 12/ 2/75 | 2 | William F. McNagny enters appearance for defs. Warren G. Sunday, John H. Hines, M.D., John C. Harvey, M.D. and Harry M. Covell, M.D. alm |
| 12/ 3/75 | | Marshal makes returns on the following summons: |
| | 3 | L. C. Baker, served 12/1/75, $10.44. |
| | 4 | Ora E. McFarlin, served 12/1/75, $3.00. |
| | 5 | Warren G. Sunday, served 12/1/75, $3.00. |
| | 6 | Harold S. Stump, served 12/1/75, $3.00. |
| | 7 | John H. Hines, M.D., served 12/1/75, $3.00. |
| | 8 | John C. Harvey, M.D., served 12/1/75, $3.00. |
| | 9 | Harry M. Covell, M.D., served 12/1/75, $3.00. ww |
| 12/ 4/75 | 10 | Carl J. Suedhoff, Jr. enters appearance as attorney of record for defendant DeKalb Memorial Hospital, Inc. ww |
| 12/ 5/75 | 11 | Motion for Enlargement of Time Within Which to File Responsive Pleading filed by Carl J. Suedhoff, Jr. counsel for DeKalb Memorial Hospital. ww |
| 12/ 5/75 | 12 | Order Entered. (SE) Eschbach, Judge. Pursuant to the motion of DeKalb Memorial Hos- |

| | | |
|---|---|---|
| | | pital filed this date, time is enlarged to and including the 16th day of January, 1976 within which to file responsive pleading to plaintiffs' complaint. Copies to Richard H. Finley, William F. McNagny, Carl J. Suedhoff, Harold D. Stump, Ora E. McFarlin 12/5/75. ww |
| 12/ 5/75 | 13 | Exhibit titled "Petition to Have Tubal Litigation Performed on Minor and Indemnity Agreement" filed. slm/ww |
| 12/12/75 | 14 | H. Charles Winans enters appearance as counsel for defendant Ora E. McFarlin. es |
| 12/18/75 | 15 | Phil M. McNagny, Jr. enters his appearance for Def. Harold D. Stump. Cert of Serv. ww |
| 12/18/75 | 16 | Answer of Def. Harold D. Stump and Motions to Dismiss filed. Cert of Serv. ww |
| 12/19/75 | 17 | Carl J. Suedhoff, Jr. enters written appearance as counsel for defendant John C. Harvey, M.D. ww |
| 12/19/75 | 18 | Motion for Enlargement of Time within Which to File Responsive filed by def. John C. Harvey, M.D. by counsel. Cert of Serv. ww |
| 12/19/75 | 19 | Order Entered. (SE) Eschbach, Judge. Defendant John C. Harvey, M.D., shall have to and including the 16th day of January, 1976 in which to file responsive pleading to plaintiff's complaint. Copies to: H. Charles Winans, Carl J. Suedhoff, Jr., William F. McNagny, Phil M. McNagny, Jr., Richard A. Finley. 12/19/75. ww |
| 12/22/75 | 20 | Answer of Defendants, Warren G. Sunday, John H. Hines, M.D. and Harry M. Covell, M.D. filed. Cert of Serv. ww |



| | | |
|---|---|---|
| 12/23/75 | 21 | Answer of Ora E. McFarlin filed. Cert. of Serv. ww |
| 1/ 5/76 | 22 | Motion for Extension of Time for Filing Answer Brief filed by plaintiffs. Cert. of Serv. ww |
| 1/ 5/76 | 23 | Order Granting Extension of Time entered. (SE) Eschbach, Judge. The time is extended to and including the 16th day of January, 1976 in which plaintiffs have to answer the motions to dismiss heretofore filed by defendant, Harold D. Stump. Copies to: H. Charles Winans, Carl J. Suedhoff, Jr., William F. McNagny, Phil M. McNagny, Jr., Richard H. Finley 1/5/76. ww |
| 1/13/76 | 24 | Motion to Dismiss filed by defs. Hines, Covell, Sunday by counsel. Cert of Serv. ww |
| 1/14/76 | 25 | Motion for Enlargement of Time Within Which to File Responsive Pleading filed by defendants Harvey and DeKalb Memorial Hospital. Cert of Serv. ww |
| 1/14/76 | 26 | Order Entered. (SE) Eschbach, Judge. Defendants Harvey and Dekalb Memorial Hospital have to and including the 14th day of February, 1976 within which to file responsive pleading to plaintiff's complaint. Copies to: Richard H. Finley, Phil M. McNagny, Jr., William F. McNagny, Carl J. Suedhoff, Jr., H. Charles Winans 1/14/76. ww |
| 1/16/76 | 27 | Plaintiffs' Reply Brief to the Memorandum Filed on Behalf of Harold D. Stump in Support of His Motion to Dismiss filed. Cert. of Serv. ww |

| | | |
|---|---|---|
| 1/27/76 | 28 | Correction to Plaintiffs' Reply Brief to the Memorandum Filed on Behalf of Harold D. Stump in Support of His Motion to Dismiss filed. Cert. of Serv. ww |
| 1/27/76 | 29 | Motion for Extension of Time for Filing Answer Brief filed by counsel for plaintiff. Cert. of Serv. ww |
| 1/27/76 | 30 | Order Granting Extension of Time entered. (SE) Eschbach, Judge. The Court now extends the time in which plaintiffs may file their answer brief to and including 2/16/76. Copies to Richard H. Finley, Phil M. McNagny, Jr., William F. McNagny, Carl J. Suedhoff, Jr., H. Charles Winans 1/27/76. ww |
| 2/17/76 | 31 | Plaintiffs' Reply Brief to Defendants John H. Hines, M.D., Harry M. Covell, M.D., and Warren G. Sunday's Memorandum in Support of Their Motion to Dismiss filed. Cert. of Serve. www |
| 2/17/76 | 32 | Motion to Dismiss filed by Carl J. Suedhoff, Jr., counsel for defendants John C. Harvey, M.D., and DeKalb Memorial Hospital. Cert. of Serv. es |
| 2/17/76 | 33 | Motion for Oral Argument Concerning Pending Motions to Dismiss Filed by Various Defendants, filed by Carl J. Suedhoff, Jr., counsel for the defendants John C. Harvey, M.D., and DeKalb Memorial Hospital. es |
| 3/ 2/76 | 34 | Motion for Extension of Time for Filing Answer Brief filed by Plaintiffs. Cert. of Serv. es |
| 3/ 2/76 | 35 | Order entered. (SE) Eschbach, Judge. Plaintiffs' Motion for Extension of Time is granted |



| | | |
|---|---|---|
| | | and extends the time in which Plaintiffs may file their answer brief to and including the 29th day of March, 1976. Copies to Richard H. Finley, William F. McNagny, Carl J. Suedhoff, Jr., H. Charles Winans, Phil M. McNagny, Jr. 3/2/76. es |
| 3/29/76 | 36 | Plaintiffs' Reply Brief to the Memoranda of Defendants, John C. Harvey, M.D. and Dekalb Memorial Hospital, Inc., filed in Support of Their Motion to Dismiss filed. Cert. of Serv. slm |
| 5/13/76 | 37 | Memorandum of Decision and Order Entered. (SE) Eschbach, Judge. Pursuant to the various Rule 12(b) motions seeking dismissal for want of jurisdiction and for failure to state a claim upon which relief can be granted, defendants' motions to dismiss are granted, and plaintiffs' first and fourth causes of action are hereby dismissed for failure to state a claim upon which relief can be granted; and the remaining claims are dismissed for lack of jurisdiction over the subject matter. Copies to: H. Charles Winans, Carl J. Suedhoff, Jr., William F. McNagny, Phil M. McNagny, Jr., Richard H. Finley 5/14/76. ww |
| 5/14/76 | 38 | Clerk's Entry of Judgment filed. Francis T. Grandys, Cierk by Wanda Webster, Deputy. Copies to: Richard H. Finley, William F. McNagny, Carl J. Suedhoff, Jr., H. Charles Winans, Phil M. McNagny, Jr. 5/14/76. ww |
| 6/10/76 | 39 | Notice of Appeal filed by Linda Kay Sparkman and Leo Sparkman, plaintiffs. Cert. of Serv. es |

| | | |
|---|---|---|
| 6/10/76 | 40 | Appeal Bond in the sum of $250.00 in cash as security for costs on appeal to the Court of Appeals for the Seventh Circuit, filed. es |
| 6/10/76 | 41 | Clerk's Certification of Notice of Appeal filed. Copies to Richard H. Finley, William F. McNagny, Carl J. Suedhoff, Jr., H. Charles Winans, Phil M. McNagny, Jr. 6/10/76. es |
| 6/21/76 | 42 | George E. Fruechtenicht enters appearance as counsel for the defendant Harold D. Stump. es |
| 7/ 7/76 | 43 | File sent to U. S. Court of Appeals, Seventh Circuit. es |
| 7/18/77 | 44 | Certified copy of the judgment and copy of the opinion of the Court' received from U. S. Court of Appeals. Taxed in favor of Linda Kay Sparkman and Leo Sparkman, plaintiff-appellants, total of $295.08. Judgment of District Court is REVERSED, with costs and REMANDED. Record to be returned at a later date. es |
| 8/ 7/77 | 45 | Order for pre-trial conference entered. (SE) Eschbach, Judge. Pre-trial conference is set for Friday, October 7, 1977 at 1:00 p.m. Copy to Richard H. Finley, George E. Fruechtenicht, William F. McNagney, Carl J. Suedhoff, Jr., H. Charles Winans 7/7/77. ww |
| 8/ 8/77 | 46 | Petition for Continuance of Pre-Trial Conference filed. kh/slm |
| 8/ 9/77 | 47 | Pursuant to petition filed 8-8-77, the pre-trial conference of this cause now scheduled for 10-7-77 is continued without date. Provided, however, that counsel for the pltf herein shall file a written status report with this court |



| | | |
|---|---|---|
| | | promptly upon notification of the ruling of the Supreme Court of the U. S. on the petition for writ of certiorari filed on behalf of the defs herein. (SE) Eschbach, Judge. Copy to Richard Finley, Wm. F. McNagny, Carl J. Suedhoff, Charles Winans, Phil M. McNagny, Jr. and Geo. E. Fruechtenicht 8-9-77. kh/slm |
| 10/19/77 | 48 | One volume of record received from the U. S. Court of Appeals for the Seventh Circuit. Certified copies of the docket sheets and original record mailed to the U. S. Supreme Court, Washington, D. C. this date. kh |

UNITED STATES DISTRICT COURT
Northern District of Indiana
Fort Wayne Division

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Plaintiffs,*

*vs.*

ORA E. MCFARLIN, WARREN G. SUNDAY, HAROLD D. STUMP, individually and as Judge of the Circuit Court of DeKalb County, Indiana, JOHN H. HINES, M. D., JOHN C. HARVEY, M. D., HARRY M. COVELL, M. D., and DEKALB MEMORIAL HOSPITAL, INC., a corporation,
*Defendants.*

Civil No. F 75-129
COMPLAINT

## PRELIMINARY STATEMENT

This is an action at law to redress the deprivation of rights, privileges and immunities secured to the Plaintiff, Linda Kay Sparkman, by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States, and 42 U. S. C. §§ 1983 and 1985[3]. Linda Kay Sparkman seeks damages because of the deprivation of her rights and the physical, mental and emotional injuries she has sustained due to the actions of the Defendants in performing an operation of sterilization upon her which infringed upon her rights to privacy, due process of law and equal protection of the laws under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States. The action of Plaintiff, Leo Sparkman, for damages derives from the action of Plaintiff, Linda Kay Sparkman.



In addition, Plaintiff, Linda Kay Sparkman, seeks to have this Court declare unconstitutional on its face and as applied those sections of the Acts of 1961, ch. 91, § 1, p. 178; as amended by the Acts of 1973, P. L. 97, § 7, p. 566, "Medical or surgical treatment of incompetent—Consent." [Burns Indiana Statutes Annotated, Code Edition, 16-8-3-1], which seek to make binding on a minor a consent given by a parent to improper and unnecessary surgery. This statute is challenged on the grounds that it conflicts with the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

### JURISDICTION

[1] The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00). Jurisdiction is conferred on this Court by 28 U. S. C. §§ 1331 and 1343, and 42 U. S. C. §§ 1983 and 1985. Declaratory relief is sought pursuant to 28 U. S. C. §§ 2201 and 2202.

### PARTIES

[2] Plaintiff, Linda Kay Sparkman, is a United States citizen and a resident of Noble County, Indiana. She is nineteen (19) years old, born January 24, 1956. She is married and resides with her husband, Leo Sparkman, in Kendallville, Indiana. Prior to marriage, her name was Linda Kay Spitler.

[3] Plaintiff, Leo Sparkman, is a United States citizen and a resident of Noble County, Indiana. He is twenty (20) years old, was married to Linda Kay Sparkman on August 18, 1973, and is presently residing with his wife in Kendallville, Indiana.

[4] Defendant, Ora E. McFarlin, is a citizen of the United States, a resident of Noble County, Indiana, and is over the age of twenty-one (21) years. She is the natural mother of Plaintiff, Linda Kay Sparkman, and on the 9th day of July, 1971, she executed a "Petition to Have Tubal Ligation Performed on Minor

and Indemnity Agreement" requestion that a tubal ligation be performed upon her daughter.

[5] Defendant, Warren G. Sunday, a practicing attorney, is a citizen of the United States, a resident of DeKalb County, Indiana, and is over the age of twenty-one (21) years. He drafted the Petition signed by Ora E. McFarlin and he witnessed, as a Notary Public, the execution of the Petition by Ora E. McFarlin.

[6] Defendant, Harold D. Stump, is Judge of the Circuit Court of DeKalb, Indiana, is a citizen of the United States, a resident of DeKalb County, Indiana, and is over the age of twenty-one (21) years. On July 9, 1971, he signed the "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement" approving of the Petition as executed and requested by Ora E. McFarlin. He is sued individually and in his official capacity.

### Statement of Claim

[7] Defendant, John H. Hines, a medical doctor, is a citizen of the United States, a resident of DeKalb County, Indiana, and is over the age of twenty-one (21) years. On July 16, 1971, he performed an operation of sterilization (a tubal ligation) upon Plaintiff, Linda Kay Sparkman.

[8] Defendant, John C. Harvey, a medical doctor, is a citizen of the United States, a resident of DeKalb County, Indiana, and is over the age of twenty-one (21) years. He assisted, as anesthesiologist, in the performance of the tubal ligation on Plaintiff, Linda Kay Sparkman.

[9] Defendant, Harry M. Covell, a medical doctor, is a citizen of the United States, a resident of DeKalb County, Indiana, and is over the age of twenty-one (21) years. He assisted in the performance of the tubal ligation on Plaintiff, Linda Kay Sparkman.

[10] Defendant, DeKalb Memorial Hospital, Inc., is a corporation existing under the laws of the State of Indiana. The hospital is located in DeKalb County, Indiana. Linda Kay Sparkman was sterilized at the DeKalb Memorial Hospital, Inc.



### Statement of Claim

[11] Plaintiff, Linda Kay Sparkman, was fifteen (15) years old on June 20, 1971, when she was admitted into the Defendant, DeKalb Memorial Hospital, Inc., in Auburn, Indiana, by Defendant, Ora E. McFarlin, under the care of Defendant, John H. Hines, M. D., for the treatment of appendicitis. She was discharged from the hospital by Dr. Hines on June 22, 1971, as improved.

[12] On July 9, 1971, Defendant, Ora E. McFarlin, Linda Kay Sparkman's mother, executed a document entitled "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement," a copy of which document is attached hereto, made a part hereof, and marked "Exhibit A." This document was prepared by Defendant, Warren G. Sunday, and he witnessed the execution of the document by Defendant, Ora E. McFarlin.

[13] On July 9, 1971, Defendant, Harold D. Stump, Judge of the Circuit Court of DeKalb County, Indiana, apparently without a hearing, without Plaintiff, Linda Kay Sparkman, present, and without representation on her behalf, signed the Petition authorizing, under color of state law, the sterilization of Plaintiff, Linda Kay Sparkman, by Defendant, John H. Hines, M. D., at Defendant, DeKalb Memorial Hospital, Inc.

[14] On July 15, 1971, Linda Kay Sparkman was entered into Defendant, DeKalb Memorial Hospital, Inc., by her mother, Defendant, Ora E. McFarlin, ostensibly for the purpose of having her appendix removed.

[15] On July 16, 1971, Defendant, John H. Hines, M.D., with the knowledge, approval, acquiescence, aid and assistance of Defendants, John C. Harvey, M.D., Harry M. Covell, M.D. and DeKalb Memorial Hospital, Inc., without first informing her, performed an operation of sterilization upon Plaintiff, Linda Kay Sparkman.

[16] At the time of the operation, Defendant, John H. Hines, M.D., said he was performing the sterilization on Linda Kay Sparkman in accordance with a Court's feelings and as a service to the community in preventing the mentally slow Linda Kay Sparkman from having children who would be wards of the state.

[17] On July 20, 1971, Plaintiff, Linda Kay Sparkman, was released from Defendant, DeKalb Memorial Hospital, Inc., still unaware that she had been sterilized.

[18] On August 18, 1973 Linda Kay Sparkman was married and a few months thereafter she asked her mother, Defendant Ora E. McFarlin, why she was not getting pregnant. Plaintiff, Linda Kay Sparkman, was told by her mother at that time that she could not have children then because her Fallopian tubes had been tied, but that her tubes would come untied on their own accord.

[19] Plaintiff, Linda Kay Sparkman, did not immediately tell her husband what she had been told by her mother, for fear he would divorce her, but during or around February, 1974, Linda Kay Sparkman did tell her husband that she might have had her tubes tied when her appendix was removed. Plaintiff, Linda Kay Sparkman, and her husband, Leo Sparkman, immediately went to see Defendant, John H. Hines, M.D., around February, 1974, and they were told by him that he did not do anything to Linda Kay Sparkman but remove her appendix.

[20] Linda Kay Sparkman and Leo Sparkman began having domestic problems in the late spring of 1975, partially because of their inability to have children. They consulted an attorney for help, and in May, 1975, their attorney wrote a letter to Defendant, John H. Hines, M.D., requesting information about the nature of the operation performed on Linda Kay Sparkman in July, 1971. On May 29, 1975, in a letter written by Dr. Hines to Plaintiffs' attorney, Dr. Hines for the first time informed Plaintiffs that on July 16, 1971, a tubal ligation had been performed on Linda Kay Sparkman which would permanently



prevent her from becoming pregnant and permanently deprive her of the natural rights of motherhood.

FIRST CAUSE OF ACTION.

[21] Defendants have deprived Plaintiff, Linda Kay Sparkman, of the rights, privileges and immunities secured to her by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States under color of statutes, ordinances, regulations, customs, usages and practices of the State of Indiana, in that their acts complained of:

Then, the Court in applying this Court's decision in *Donaldson* held:

(A) Are an arbitrary exercise of state power in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States;

(B) Did not provide procedural safeguards for Linda Kay Sparkman and thereby deprived her of her rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States;

(C) Were without standards, thus permitting the sterilization of Linda Kay Sparkman in violation of her rights protected by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States;

(D) Constituted an invasion of privacy and the right to control her reproductive functions in violation of the Ninth and Fourteenth Amendments to the Constitution of the United States;

(E) Inflicted cruel and unusual punishment on Linda Kay Sparkman by sterilizing her without any rational justification in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States;

(F) Were used as a method of punishing Linda Kay Sparkman for being allegedly mentally slow and allegedly

difficult to handle in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States;

(G) Were taken in violation of the intent and procedure of state regulations relating to sterilization in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

[22] Plaintiff, Linda Kay Sparkman, has suffered damages therefrom and has suffered and continues to suffer physically, mentally and emotionally from the wrongful action of Defendants, individually and jointly, all to her damage in the sum of Five Hundred Thousand Dollars ($500,000.00); and Plaintiff, Linda Kay Sparkman, is entitled to receive punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

### Second Cause of Action.

[23] Plaintiff, Linda Kay Sparkman, repeats and realleges each and every allegation contained in Paragraphs 1 through 20 inclusive as if fully set forth herein.

[24] Performance of a sterilization operation upon Linda Kay Sparkman by Defendant, John H. Hines, M.D., with the knowledge, approval, acquiescence, aid and assistance of each of the other Defendants, individually and jointly, when said operation was in no manner necessary for the protection of Linda Kay Sparkman's health and safety was an exercise in malpractice by Defendants, and each of them.

[25] That as a result of the malpractice of Defendants, individually and jointly, Plaintiff, Linda Kay Sparkman, has suffered damages and continues to suffer physically, mentally and emotionally, all to her damage in the sum of Five Hundred Thousand Dollars ($500,000.00); and Plaintiff, Linda Kay Sparkman, is entitled to receive punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).



### Third Cause of Action.

[26] Plaintiff, Linda Kay Sparkman, repeats and realleges each and every allegation contained in Paragraphs 1 through 20 inclusive as if fully set forth herein.

[27] Performance of a sterilization operation upon Linda Kay Sparkman by Defendant, John H. Hines, M.D., with the knowledge, approval, acquiescence, aid and assistance of each of the other Defendants, individually and jointly, when said operation was not consented to by Linda Kay Sparkman, and said operation was not necessary for the health or safety of Linda Kay Sparkman, constituted an assault and battery of Plaintiff, Linda Kay Sparkman, by Defendants, thereby injuring Plaintiff, Linda Kay Sparkman.

[28] That as a result of the assault and battery on Plaintiff, Linda Kay Sparkman, by Defendants, individually and jointly, she has suffered damages and continues to suffer physically, mentally and emotionally, all to her damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

### Fourth Cause of Action.

[29] Plaintiff, Linda Kay Sparkman, repeats and realleges each and every allegation contained in Paragraphs 1 through 20 inclusive as if fully set forth herein.

[30] The actions of Defendants, Ora E. McFarlin, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D. and DeKalb Memorial Hospital, Inc., in concert and with the common goal and result of sterilizing Linda Kay Sparkman, deprived said Linda Kay Sparkman of her constitutional and statutory rights to privacy, to the equal protection of the laws and not to be deprived of life or property without the due process of law. The concerted action was taken against Linda Kay Sparkman because of her sex, her marital status and of her allegedly low mental ability, all in violation of 42 U. S. C. § 1985(3).

[31] Plaintiff, Linda Kay Sparkman has suffered damages therefrom and has suffered and continues to suffer physically and mentally from the wrongful action of Defendants, individually and jointly, all to her damage in the sum of Five Hundred Thousand Dollars ($500,000); and Plaintiff, Linda Kay Sparkman, is entitled to receive punitive damages in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

FIFTH CAUSE OF ACTION.

[32] Plaintiff, Leo Sparkman, repeats and realleges each and every allegation contained in Paragraphs 1 through 31 inclusive as if fully set forth herein.

[33] That as a result of the wrongful act of Defendants, individually and jointly, in performing the operation of sterilization upon Linda Kay Sparkman, she is no longer able to bear children, as a direct consequence of which, Plaintiff, Leo Sparkman, is now and will be unable in the future to father a child or children of his marriage to Linda Kay Sparkman, and his comfort and happiness in her companionship have been and will in the future be impaired, all to Plaintiff, Leo Sparkman's general damage in the sum of Five Hundred Thousand Dollars ($500,000.00).

WHEREFORE, Plaintiffs pray that this Court:

(A) Grant Plaintiff, Linda Kay Sparkman, compensatory damages in the sum of Two Million Dollars ($2,000,000.00)

(B) Grant Plaintiff, Linda Kay Sparkman, punitive damages in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

(C) Grant Plaintiff, Leo Sparkman, compensatory damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

(D) Declare unconstitutional on its face and as applied those sections of the Acts of 1961, ch. 91, § 1, p. 178; as amended by the Acts of 1973, P. L. 97, § 7, p. 566, "Medical or surgical treatment of incompetent—Consent." [Burns Indiana



Statutes Annotated, Code Edition, 16-8-3-1], which seek to make binding on a minor a consent given by a parent to improper and unnecessary surgery.

(E) Order Defendants, and each of them, to pay and reimburse Plaintiffs for Court costs and reasonable attorney's fees.

(F) Grant Plaintiffs such other and further relief to which they may be entitled.

FINLEY & FINLEY,
/s/ By RICHARD H. FINLEY,
Richard H. Finley,
124 East Rush Street,
Kendallville, IN 46755,
(219) 347-0600,
*Attorneys for Plaintiffs.*

Plaintiffs hereby make demand for a trial by jury of the action within pursuant to Rule 38 of the Federal Rules of Civil Procedure.

/s/ RICHARD H. FINLEY,
Richard H. Finley.

UNITED STATES DISTRICT COURT.

* * [Caption Omitted in Printing] * *

## ANSWER AND MOTIONS TO DISMISS

Comes now the defendant, Harold D. Stump, individually and as Judge of the Circuit Court of DeKalb County, Indiana, and for answer to plaintiffs' complaint alleges and says that:

*First Defense.*

The complaint fails to state a claim against this defendant either individually or as Judge of DeKalb Circuit Court, DeKalb County, Indiana, upon which relief can be granted.

*Second Defense.*

1. Defendant Harold D. Stump denies the allegations contained in paragraphs 1, 21, 22, 24, 25, 27, 28, 30, 31, and 33 of the complaint.

2. 2. Defendant Harold D. Stump admits the allegations contained in paragraphs 2, 4, 5, and 12 of the complaint.

3. Defendant Harold D. Stump admits the allegations in paragraphs 6 and 13 that he is Judge of the Circuit Court of DeKalb County, Indiana, a citizen of the United States and a resident of DeKalb County, Indiana, and over 21 years of age, and denies the remaining allegations of paragraphs 6 and 13.

4. Defendant Harold D. Stump is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 3, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, and 20 of the complaint.

5. Defendant Harold D. Stump in answer to paragraphs 23, 26, 29, and 32, re-alleges as is fully set forth herein his allegations to paragraphs 1 through 20 of the complaint.

*Third Defense.*

Pursuant to IC 34-4-16.5-3, this defendant would not be liable by reason of the fact that at all times mentioned in plaintiffs' complaint this defendant was the duly appointed and acting judge of the DeKalb Circuit Court and was performing a discretionary function, *i.e.*, enforcement of a law, and acting under authority of a statute.



*Fourth Defense.*

At the time the alleged wrongful acts set out in plaintiffs' complaint occurred, the plaintiff, Leo Sparkman, was not married to the plaintiff, Linda Kay Sparkman, and therefore no right to bring an action for loss of consortium would lie in the plaintiff Leo Sparkman.

*Fifth Defense.*

The plaintiffs have no action against the defendant, Harold D. Stump, as an individual, by reason of the fact that as an individual this defendant would not be acting under color of law.

*Sixth Defense.*

The mother of the plaintiff, Linda Kay Sparkman, acting by and for said plaintiff, petitioned for and consented to the alleged operation of tubal ligation performed on the plaintiff, Linda Kay Sparkman. The consent to the surgical treatment was given by the mother of the plaintiff, Linda Kay Sparkman, pursuant to IC 16-8-3-1, and pursuant to said act the consent was binding on the plaintiff, Linda Kay Sparkman.

*Seventh Defense.*

The right of action set forth in the complaint did not accrue within two years next before the commencement of this action.

*Motions to Dismiss.*

The defendant Harold D. Stump, individually and as Judge of the Circuit Court of DeKalb County, Indiana, moves the Court as follows:

1. To dismiss the action as to the plaintiff, Leo Sparkman, because the complaint shows on its face that said plaintiff has no cause of action against this defendant upon which relief can be granted.

2. To dismiss this action against this defendant as an individual because unless this defendant was acting under color of law the Court would have no jurisdiction of this defendant as an individual under and pursuant to 42 U. S. C. § 1983 and § 1985.

*Memorandum.*

This defendant would concede that a husband has an independent right of action for a tortious wrong done to his wife. *Burk* v. *Anderson et al.*, 232 Ind. 77, 109 N. E. 2d 407 (1952). Even so, the right of action for consortium is founded on the marital relationship which must exist at the time the alleged tort is said to have occurred. 41 Am Jur 2d § 447, Husband and Wife, note 8. This well-recognized rule is perhaps best summed up in the oft quoted statement that you cannot marry a lawsuit.

It would appear from the pleadings that the present cause of action is predicated on the Civil Rights Act which requires as an element of the action that the defendant be acting under color of law at the time the alleged wrong took place. It is respectfully submitted that for that reason the action must fail against the defendant, Harold D. Stump, as an individual.

GATES, GATES & MCNAGNY
By /s/ PHIL M. MCNAGNY, JR.
Phil M. McNagny, Jr.
The Farmers Loan & Trust Co. Bldg.
Columbia City, IN 46725
Telephone: (219) 244-5175
*Attorneys for Defendant,*
*Harold D. Stump*



UNITED STATES DISTRICT COURT

* * (Caption Omitted in Printing] * *

## MOTION TO DISMISS

Comes now defendants, John H. Hines, M.D., Harry M. Covell, M.D., and Warren G. Sunday, by their attorneys Barrett, Barrett & McNagny and move the Court as follows:

1. For an order dismissing this action against these defendants for the reason that the Court lacks subject matter jurisdiction in the above captioned case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative;

2. For an order dismissing this action against these defendants for the reason that the plaintiff has failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## MEMORANDUM

(Deleted)

BARRETT, BARRETT & MCNAGNY
By: WILLIAM F. MCNAGNY

UNITED STATES DISTRICT COURT

* * (Caption Omitted in Printing] * *

## ANSWER OF ORA E. McFARLIN

Comes now Ora E. McFarlin, counsel H. Charles Winans and for answer to plaintiffs Complaint alleges and says:

### *I. General Denial*

For answer to plaintiffs complaint says:

(1.) That the statements made in plaintiffs complaint "preliminary statement" are untrue and inaccurate and that this defendant denies the truth or accuracy of the statements made therein; and further that this defendant denies the correctness of the conclusions of fact and law stated therein; and further that this defendant denies that this defendant has any liability to the plaintiffs individually or separately for any act or omission whatsoever; and further that this defendant denies that she has caused any infringement of constitutional right or privilege of either of the plaintiffs, jointly or severally; and further that the attempted application of the alleged constitutional rights of the plaintiffs to the factual situation described is erroneous, improper and not within the purview of the United States Constitution or any judicial application thereof; and finally this defendant denies that the plaintiffs or either of them have by their complaint, the facts alleged therein, or the parties named and served created a proper legal issue of constitutionality of any statute of the State of Indiana.

### *II. Specific Denial*

Defendant Ora E. McFarlin denies specifically or is without knowledge as to the accuracy of, each and every material allegation of plaintiffs complaint in numbered paragraphs (1); (3);



and (13) in so far as same alleges that Linda Kay Sparkman was without representation, or that the judge acted only under color of law; (14); (17); (18); (19); (20); (21); (22); (23); (24); (25); (26); (27); (28); (29); (30); (31); (32); (33); the defendant further denies that the plaintiffs or either of them are entitled to any damages against this defendant compensatory or punitive.

### *III. Admissions*

Defendant Ora E. McFarlin admits specifically the allegations in plaintiffs complaint in paragraphs numbered (2); (4); (11); and (12).

### *IV. Not Applicable to This Defendant*

Defendant Ora E. McFarlin denies that there is any application whatsoever of the allegations in the following numbered paragraphs to this defendant, to wit: (5); (6); (7); (8); (9); (10); (15); (16).

WHEREFORE the defendant Ora E. McFarlin prays the court to find against the plaintiffs jointly and severally and adjudge that they take nothing by their complaint and that a judgment be entered in favor of the defendant Ora E. McFarlin for the costs of this action.

/s/ H. CHARLES WINANS
H. Charles Winans
*Attorney for Defendant*
*Ora E. McFarlin*

UNITED STATES DISTRICT COURT

* * (Caption Omitted in Printing] * *

## MOTION TO DISMISS

Come now the defendants, John C. Harvey, M.D., and DeKalb Memorial Hospital, Inc., by their attorney, Carl J. Suedhoff, Jr., and move the Court as follows:

1. For an order dismissing this action against these defendants for the reason that the Court lacks subject matter jurisdiction in the above captioned case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative;

2. For an order dismissing this action against these defendants for the reason that the plaintiffs has failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

HUNT, SUEDHOFF, BORROR,
EILBACHER & LEE

By: /s/ CARL J. SUEDHOFF, JR.
Carl J. Suedhoff, Jr.
6th Floor, Lincoln Bank Tower
Fort Wayne, Indiana 46802
Telephone: 219 423-1311
*Attorney for Defendants, John C. Harvey, M.D. and DeKalb Memorial Hospital, Inc.*



STATE OF INDIANA
COUNTY OF DEKALB } SS:

## PETITION TO HAVE TUBAL LIGATION PERFORMED ON MINOR AND INDEMNITY AGREEMENT

Ora Spitler McFarland, being duly sworn upon her oath states that she is the natural mother of and has custody of her daughter, Linda Spitler, age fifteen (15) being born January 24, 1956 and said daughter resides with her at 108 Iwo Street, Auburn, DeKalb County, Indiana.

Affiant states that her daughter's mentality is such that she is considered to be somewhat retarded although she is attending or has attended the public schools in DeKalb Central School System and has been passed along with other children in her age level even though she does not have what is considered normal mental capabilities and intelligence. Further, that said affiant has had problems in the home of said child as a result of said daughter leaving the home on several occasions to associate with older youth or young men and as a matter of fact having stayed overnight with said youth or men and about which incidents said affiant did not become aware of until after such incidents occurred. As a result of this behavior and the mental capabilities of said daughter, affiant believes that it is to the best interest of said child that a Tubal Ligation be performed on said minor daughter to prevent unfortunate circumstances to occur and since it is impossible for the affiant as mother of said minor child to maintain and control a continuous observation of the activities of said daughter each and every day.

Said affiant does hereby in consideration of the Court of the DeKalb Circuit Court approving the Tubal Ligation being performed upon her minor daughter does hereby covenant and agree to indemnify and keep indemnified and hold Dr. John Hines, Auburn, Indiana, who said affiant is requesting perform said operation and the DeKalb Memorial Hospital, Auburn,

Indiana, whereas said operation will be performed, harmless from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.

IN WITNESS WHEREOF, said affiant, Ora Spitler McFarlin, has hereunto subscribed her name this 9th day of July, 1971.

/s/ ORA SPITLER MCFARLIN
Ora Spitler McFarlin
*Petitioner*

Subscribed and sworn to before me this 9th day of July, 1971.

/s/ WARREN G. SUNDAY
Warren G. Sunday
*Notary Public*

My commission expires January 4, 1975.

---

I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

/s/ HAROLD D. STUMP
*Judge, DeKalb Circuit Court*

Dated July 9, 1971

Supreme Court, U. S.
FILED
AUG 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1976**

---

**NO. 76-1750**

---

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and
WARREN G. SUNDAY,
*Petitioners*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

RICHARD H. FINLEY
124 East Rush Street
Kendallville Indiana
(219) 347-0600
*Counsel for Respondents*

Central Publishing Company, Inc., Indianapolis, Ind. 46206

## INDEX


| | Page |
|---|---|
| Table of Authorities | ii |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented for Review | 2 |
| Constitution and Statutes | 2 |
| Statement of the Case | 2 |
| Argument | 5 |
| I. The decision below is clearly correct and does not conflict with prior Supreme Court decisions | 5 |
| II. This case does not warrant review | 8 |
| III. Response to *Amicus Curiae* Brief | 10 |
| Conclusion | 12 |

**Appendix**

Relevant Portions of Indiana Code §§ 16-13-13-1 through 16-13-13-4 ..... A-1, A-2

## TABLE OF AUTHORITIES


*Cases* — *Page*

*A.L. v. G.R.H.*, —— Ind. App. ——, 325 N.E. 2d 501 (1975) ..... 6, 7

*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 ..... 5, 8, 9

*Frazier v. Levi*, 440 S.W. 2d 393 (Tex Ct. Civ. App. 1969) ..... 6

*Holmes v. Powers*, 439 S.W. 2d 579 (Ky. Ct. App. 1968) 6

*In re Richardson*, 284 S.2d 185 (La. App. 1973) ..... 7

*Lausier v. Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180 (Wis. 1975) ..... 7

*Marr v. Rife*, 503 F.2d 735 [6th Cir. 1974] ..... 11

*Monroe v. Pape*, 365 U.S. 167 ..... 10

*Nelson v. Knox*, 256 F.2d 312 [6th Cir. 1958] ..... 11

*Pierson v. Ray*, 386 U.S. 547 ..... 5, 8, 9, 10

*Scheurer v. Rhodes*, 416 U.S. 232 ..... 10

*Skinner v. Oklahoma*, 316 U.S. 535 ..... 7

*State v. Libbert*, 96 Ind. App. 84, 177 N.E. 873 (1931), rehearing denied, 96 Ind. App. 84, 180 N.E. 757 (1932) ..... 11


*Federal and State Statutes*


Federal Statutes

42 U.S.C. § 1983 ..... 3, 4

42 U.S.C. § 1985 (3) ..... 3, 4

State Statutes

Indiana Code § 16-8-3-1 ..... 7

Indiana Code § 16-8-4-2 ..... 7

Indiana Code §§ 16-13-13-1 through 16-13-13-4 .... 6

Indiana Code § 33-4-4-3 ..... 6




IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1976**

---

**NO. 76-1750**

---

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and
WARREN G. SUNDAY,
*Petitioners*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

Except that the opinion of the Court of Appeals for the Seventh Circuit is reported at 552 F.2d 172 (1977), the opinions below are adequately set forth in the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

The question is whether a state court judge who approves of the sterilization of a 15-year-old girl is judicially immune from liability under federal civil rights statutes when the approval is made in the absence of statutory or common law authority, without a guardian *ad litem* appointed to represent the girl's interests, without any filing in court, without any hearing, without notice to the girl or anyone on her behalf, and without any opportunity to appeal the decision to have her sterilized.

## CONSTITUTION, FEDERAL AND STATE STATUTES

The relevant portions of the Constitution and federal and state statutes are adequately set forth in the Petition, except for relevant portions of I.C. §§ 16-13-13-1 through 16-13-13-4, which are set forth as an Appendix hereto.

## STATEMENT OF THE CASE

In 1971 Defendant Ora McFarlin sought court approval to have her 15-year-old daughter, Linda Sparkman, sterilized. Defendant Warren G. Sunday, an attorney, prepared the "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement." The petition contained an affidavit by Ora McFarlin stating that Linda was "somewhat retarded" even though she attended public schools and had been "passed along with other children in her age level." The purpose given by Ora McFarlin for the requested sterilization was to "prevent unfortunate



circumstances." The petition was presented to Defendant Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, who issued the order of sterilization, termed an "approval," in an *ex parte* hearing without a guardian *ad litem* appointed to represent Linda's interests, without a hearing, without having given Linda or anyone on her behalf notice of the petition, and without the filing of any papers in his Court. The actions of the Judge effectively and completely denied Linda, or anyone on her behalf, the opportunity to appeal the decision of the Judge or to stop the operation for permanent sterilization from being performed.

After Judge Stump had signed the order, Linda was taken to a local hospital where a tubal ligation was performed. Linda was not informed of the true consequences of the surgery; in fact, she was told that the purpose of the hospital visit was to have her appendix removed. It was not until 1975, two years after Linda's marriage to Plaintiff Leo Sparkman, that Linda was informed that she had been sterilized.

Linda and Leo Sparkman brought an action seeking damages under Title 42 U.S.C. §§ 1983 and 1985 (3), contending that the actions of the Defendants in sterilizing her or causing her to be sterilized violated her Constitutional rights. Linda Sparkman attached pendent state claims for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The United States District Court for the Northern District of Indiana, Fort Wayne Division, granted Defendants' motions to dismiss the federal claims, holding that the actions of Judge Stump presented the only state action necessary to provide federal court jurisdiction; and that

since the actions of Judge Stump were clothed with absolute judicial immunity neither he nor his alleged co-conspirators were liable under Title 42 U.S.C. §§ 1983 and 1985 (3). Plaintiffs' remaining claims were dismissed as they were pendent to the federal causes of action.

An appeal was taken and on March 23, 1977, the Seventh Circuit Court of Appeals, with Judge Luther M. Swygert speaking for a unanimous Court, reversed the decision of the District Court and ordered the case remanded for further consistent proceedings.

## ARGUMENT

### I.

### THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT CONFLICT WITH PRIOR SUPREME COURT DECISIONS

Petitioners would have this Court believe that the United States Court of Appeals for the Seventh Circuit has in this case made new law in contradiction to *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 and *Pierson v. Ray,* 386 U.S. 547. They ridicule the Seventh Circuit's unanimous opinion as merely "paying lip services to the unequivocal holdings of *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.*" (Petition, page 6.) Petitioners maintain that as a judge of a court of general jurisdiction, Harold D. Stump was entitled to the protection of the doctrine of immunity for any act he performed while Judge. This Court has never so held. Rather, this Court has held quite differently: Any judge performing a judicial act within his jurisdiction is entitled to judicial immunity for those acts. A judge is not entitled to immunity for acts in "clear absence of all jurisdiction." *Bradley, supra,* at 351.

The opinion of the Court of Appeals in this case was, for the reasons cited therein, that Judge Stump acted extrajudicially, in clear absence of all jurisdiction. The Court of Appeals was not paying mere lip service to the holdings of this Court—it quite carefully examined the outrageous fact situation presented by this case, and in applying the fact situation to the law unanimously found that Judge Stump was not entitled to the protection of the doctrine of immunity because he had acted extrajudicially and in clear absence of all jurisdiction.

It would serve no purpose here for Respondents to repeat and support the cogent analysis of the Court of Appeals' application of the fact situation in the case at bar to the law of judicial immunity as established by this Court. Suffice it to say that it is clear, as the Court of Appeals found, that Judge Stump acted contrary to the Indiana statutes regarding sterilization[1] and contrary to the common law as shown by *Holmes v. Powers,* 439 S.W.2d 579 (Ky. Ct. App. 1968) and *Frazier v. Levi,* 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969).

The fact that the DeKalb Circuit Court is a court of general jurisdiction having jurisdiction "in all cases at law and in equity" (I.C. § 33-4-4-3) cannot possibly mean, as Petitioners maintain, that Judge Stump or any other judge would be free to perform any act upon any person which the whim of the judge might dictate. This statute must be read in conjunction with common sense and it must be interpreted with common sense. Can a judge cut off arms and legs merely because the power to do so is not specifically denied him by the statute granting his jurisdiction? If justice means anything, it means that a judge cannot perform such an act free from liability. Therefore, the analysis of this statute by the Court of Appeals *must* be correct.

Petitioners relied in the Court of Appeals and here upon *A.L. v. G.R.H.*, — Ind. App. —, 325 N.E.2d 501 (1975) as an indication that Judge Stump could not have known that there were common law and statutory bars preventing him from ordering the sterilization of Linda Sparkman.

---

[1] Indiana Code §§ 16-13-13-1 through 16-13-13-4 (Repealed, 1974) authorized the sterilization of certain institutionalized persons under rigid procedures designed to protect the interests of those persons, including the right of appeal. See Appendix, *infra*.



(Petition, pages 7, 8.) As the Court of Appeals properly noted (Petition, pages A12, A13) and as the decision of the Indiana Appellate Court in *A.L. v. G.R.H.* establishes, the statutory and common law bars did exist in 1971 and, therefore, this Indiana decision supports the accuracy of the opinion by the Court of Appeals in this case.

Petitioners argue that there were Indiana statutes authorizing a parent to consent to medical treatment on a child (I.C. § 16-8-4-2) and making the consent binding on the patient (I.C. § 16-8-3-1); and as a result of these statutes, Judge Stump impliedly had jurisdiction to direct the sterilization of Linda Sparkman because the mother had consented to it. (Petition, page 8.) This argument carried no weight with the District Court in this case (Petition, page A6), with the Court of Appeals in this case (by implication) or with the Indiana Appellate Court in *A.L. v. G.R.H., supra* (by implication). The only logical or Constitutional interpretation of these consent statutes would be that a parent could consent to *necessary* surgical treatment on a child. See *In re Richardson,* 284 S.2d 185 (La. App. 1973); *Lausier v. Pescinski,* 67 Wis.2d 4, 226 N.W.2d 180 (Wis. 1975). The sterilization of Linda Sparkman was *not* necessary surgery and it deprived her of her Constitutionally protected rights. *Skinner v. Oklahoma,* 316 U.S. 535.

It is not merely paying lip service, as Petitioners maintain, for the Court of Appeals to have correctly decided that Judge Stump acted in the clear absence of jurisdiction and that he is therefore not entitled to reach the protection of the doctrine of immunity as that doctrine has been established. In their Statement of the Case and in their Argument, Petitioners have overlooked the outrageous disregard Judge Stump demonstrated for the rights of Linda Sparkman. The manner in which he

approved of her sterilization was calculated to hide the sterilization from her, which sterilization was not authorized by legislation or common law. The action of Judge Stump was so taken as to prevent Linda or anyone on her behalf from seeking recourse through the courts to prevent the sterilization from taking place.

What Petitioners now seek is a rehearing of the factual issues decided by a unanimous Seventh Circuit Court of Appeals. To do so they have attempted to persuade this Court that what was a correct application of the fact situation to the law regarding judicial immunity was rather a misinterpretation of the law set forth in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.* What the Court of Appeals really did was correctly apply the facts to the law. In this case Judge Stump acted so totally without jurisdiction as to deny him the protection of the doctrine of immunity.

## II.

## THIS CASE DOES NOT WARRANT REVIEW

Petitioners maintain that the decision of the Court of Appeals if allowed to stand "would render meaningless the standards for judicial immunity as established by this Court in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra,*" and would adversely affect the liability of every trial court judge in our country. (Petition, page 14.) No judge need be frightened by the decision of the Seventh Circuit Court of Appeals in this case, unless the judge acts extrajudicially or in the complete absence of jurisdiction. That is what the Court of Appeals' decision holds in this case and that is precisely what this Court held in *Bradley v. Fisher* and *Pierson v. Ray.*



For very good reason, this Court has never held that a judge is entitled to immunity for every act which he might do while holding the title of Judge. This Court has required only that a judge perform a judicial act within his jurisdiction before he is entitled to immunity for his actions. This is not a stringent requirement. This doctrine even allows a judge who acts maliciously, but within his jurisdiction, to reach the shield of judicial immunity. *Pierson v. Ray, supra,* at 554. Fortunately, because of the almost unfailingly high calibre of our judiciary at each level throughout the United States, it is rare that a judge needs to reach for the protection of the doctrine of immunity. However, for the ever-so-rare instance when a judge does act in the complete absence of jurisdiction, it is absolutely necessary under our judicial structure that the doctrine of immunity not prevent recourse.

The public has faith in our judiciary and complies even with distasteful orders. If blanket immunity were granted our judiciary and judges were free to commit atrocities, without liability, the public faith in our judiciary would reasonably be destroyed. Our judicial system needs to maintain the faith the public has shown in it. The public deserves no less.

If our judicial system is to have any checks, it is imperative that the doctrine of immunity remain as set forth in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.* The fact that Judge Stump's actions in the instant case took him outside of the protection of the doctrine of immuntiy must not be reason to change the doctrine to allow blanket immunity to every judge in every case.

It is obvious that the issue presented in this case is uniquely narrow and is predicated upon a fact situation which is so unlikely to be repeated that it does not warrant review by this Court. If this Court were to restate the

doctrine of immunity to grant immunity to a judge who acts as Judge Stump acted,[2] the door would be open to dangerous abuse. As the doctrine now stands, lower courts can follow this Court's directives and in those very rare instances where a judge acts without jurisdiction, hold him liable. For many years the presently existing doctrine of immunity has reasonably guided the lower courts. A rare instance of judicial abuse should not be reason to change the doctrine which presently fairly protects the judiciary while allowing for liability in very rare, maverick instances.[2]

## III.

## RESPONSE TO *AMICUS CURIAE* BRIEF

The State of Indiana has filed an *amicus curiae* brief in support of the Petition for Writ of Certiorari. The significant portion of the State's brief argues that the determination of whether or not judicial immunity should attach to the actions of Judge Stump should be a determination made under principles of law of the State of Indiana rather than federal law. The State of Indiana is wrong. Federal law, not state law, applies and determines the adequacy of defenses asserted in federal civil rights actions. *Scheurer v. Rhodes,* 416 U.S. 232; *Pierson v. Ray, supra; Monroe v. Pape,* 365 U.S. 167. Additionally, in 1974 the United States Court of Appeals for the Sixth Circuit said:

---

[2] Senior District Judge William G. East of the District of Oregon sat by designation on this case in the Seventh Circuit Court of Appeals. It is informative that from his experience as a trial level judge he held that the actions of Judge Stump in directing the sterilization of Linda Sparkman were outside of Judge Stump's jurisdiction.



> We hold at the outset that the extent of the defendants' insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each state cannot be left to decide for itself which of its officials are completely immune from liability for depriving a citizen of rights granted by the Federal Constitution. The question must be decided as a matter of general law. (*Marr v. Rife,* 503 F.2d 735 at 740 [6th Cir. 1974], quoting from *Nelson v. Knox,* 256 F.2d 312 [6th Cir. 1958].)

Even if Indiana law were to apply in determining whether Judge Stump had judicial immunity for his act in approving of the sterilization of Linda Sparkman, it appears clear that he would not be entitled to judicial immunity. In *State v. Libbert,* 96 Ind. App. 84, 177 N.E. 873 (1931), rehearing denied, 96 Ind. App. 84, 180 N.E. 757 (1932), the Indiana Appellate Court, sitting *en banc,* held that a Judge who committed a Defendant to jail after the expiration of a suspended sentence could be liable in civil damages. The Court held that judicial immunity does not extend to an act done outside of a court's jurisdiction:

> Where there is a total lack of jurisdiction of either the person or of the subject-matter, the judge's office is no protection to him, and though he exercise judicial functions, his acts are absolutely void. 177 N.E. at 875.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. FINLEY
124 East Rush Street
Kendallville, Indiana
(219) 347-0600
*Counsel for Respondents*

# APPENDIX

## APPENDIX

Indiana Code § 16-13-13-1 (Repealed, 1974). *Authorization.*—Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician or surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1—16-13-13-6]. [Acts 1927, ch. 241, § 1, p. 713; 1937, ch. 244, § 1, p. 1164].

Relevant portions of Indiana Code § 16-13-13-2 (Repealed, 1974). *Petition by superintendent to governing board—Notice—Hearing—Order.* A copy of said petition shall be served upon the inmate together with a notice in writing designating the time and place in said institution or elsewhere, not less than thirty [30] days before the presentation of such petition to said board, when and where said board may hear and act upon such petition. Such inmate shall be produced before such board of [at] such hearing.

• • • • •

Any party to the said proceedings shall have the right to be represented by counsel at such hearings, and to cross-examine all witnesses produced by and who testify at the instance of the opposite party.

Relevant portions of Indiana Code § 16-13-13-3 (Repealed, 1974). *Appeal to circuit court—Stay of proceedings.*—From any order so entered by the Indiana council for mental health [commissioner of mental health] the said inmate or his guardian or parent or next friend shall, within thirty [30] days after the date of such order, have an appeal as of right to the circuit court of the county in which said institution is situated, . . .

• • • • •

The pendency of such appeal shall stay proceedings under the order of the council [commissioner of mental health until the appeal be determined.

Indiana Code 16-13-13-4 (Repealed, 1974). *Appeal from circuit to Supreme Court—Act of 1927.*—Any party to such appeal in the circuit court may within thirty [30] days after the date of the final order therein, apply for an appeal to the Supreme Court, which Supreme Court may grant or refuse such appeal and shall have jurisdiction to hear and determine the same upon the record of trial in the circuit court and to order the circuit court to make in the matter such order as may to the Supreme Court seem proper. The pendency of an appeal in the Supreme Court shall operate as a stay or proceedings under any orders of the board or of the circuit court until the appeal be determined by the Supreme Court. [Acts 1927, ch. 241, § 4, p. 713.].

Supreme Court, U. S.
FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*vs.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF FOR THE PETITIONERS.

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
219-423-9551,
*Counsel for Petitioners.*

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

## INDEX.


PAGE

Table of Authorities ..... iii

Opinions Below ..... 1-2

Jurisdiction ..... 2

Questions Presented ..... 2

Statutes, Rules and Regulations Involved ..... 3-6

Statement of the Case ..... 7-8

Summary of Argument ..... 9-11

Argument ..... 12-29

I. The DeKalb County Circuit Court of Which Harold D. Stump Is Presiding Judge Was at All Times Pertinent to This Litigation a Court of Original, Exclusive, General Jurisdiction Over All Causes, Matters and Proceedings Except Those Expressly Removed from It ..... 12-13

II. The Doctrine of Judicial Immunity Protects a Judge from Civil Liability for Any Act Within His Jurisdiction Done in the Exercise of His Judicial Function ..... 13-14

III. A Court of General Jurisdiction Possesses the Power of Determining Its Own Jurisdiction ..... 15-18

IV. Judicial Immunity Is Not Lost Through Procedural Errors, Irregularities or Deficiencies of a Circuit Court Judge's Acts. An "Approval" Is Not an "Order" ..... 18-23

V. At All Pertinent Times, Judge Stump Acted in His Judicial Capacity. Judicial Immunity Exists for Any Act Done by a Judge in the Exercise of His "Judicial Function" ..... 23-25

VI. In Applying the Doctrine of Judicial Immunity, the Terms "Jurisdiction" and "Judicial Function" Are Given Broad Definition ..... 25-26

VII. Only Clear Absence of All Jurisdiction Over the Subject-Matter and That Fact Known to the Judge Will Bring About a Denial of Immunity . . 26-28

VIII. The Opinion of the Court of Appeals Is Erroneous Because It Ignores, Conflicts with and Represents an Unwarranted Departure from the Statutory Authorities of the State of Indiana and the Precedent of This Court . . . . . 28-29

Conclusion . . . . . 30-32



TABLE OF AUTHORITIES CITED.

*Cases.*

A. L. v. G. R. H., 325 N. E. 2d 501 (Ind. App. 1975) . . . . . 10, 11, 18, 27, 29

Apton v. Wilson, 506 F. 2d 83 (D. C. Cir. 1974) . . . . . 25

Baltimore & Ohio Railway Co. v. Freeze, 82 N. E. 761, 169 Ind. 370 (1906) . . . . . 10, 16

Barksdale v. Ryan, 398 F. Supp. 700 (N. D. Ill. 1974) . . 24, 25

Bradley v. Fisher, 13 Wall. 335, 80 U. S. 335, 20 L. Ed. 646 (1871) . . . . . 9, 10, 11, 14, 15, 19, 22, 29

Collins v. Powell, 224 Ia. 1015, 277 N. W. 477, 481 . . . . 13

Comstock v. Eagleton, 11 Okl. 487, 69 P. 955, 196 U. S. 99 . . . . . 22

Federal Land Bank of Louisville, Kentucky v. Crombie, 258 Ky. 383, 80 S. W. 2d 39, 40 . . . . . 13

Gregory v. Thompson, 500 F. 2d 59 (1974) . . . . . 24

Grow v. Fisher, 523 F. 2d 875 (1975) . . . . . 19

Harris v. Souder, 119 N. E. 2d 8 (Ind. S. Ct. 1954) . . . . . 24

Headley v. Ball, 284 Ala. 488, 226 So. 2d 90 (1969) . . . . 21

Hicks v. State, 230 N. E. 2d 757 (Ind. S. Ct. 1957) . . . . . 24

In Re: Gardiner's Estate, 45 Cal. 2d 559, 114 P. 2d 643 . . 13

Jacobson v. Schaefer, 441 F. 2d 127 (7th Cir. 1971) . . . 10, 20

Johnson v. McCoy, 278 2d 37, 40 (9th Cir. 1960) . . . . . 10, 16

Luttrell v. Douglas, 220 F. Supp. 278 (7th Cir. 1963) . . 20, 28

Lynch v. Johnson, 420 F. 2d 818 (6th Cir. 1970) . . . . . 28

Mattice v. Kingston Chess Co., 33 N. Y. Supp. 2d 799, 801 . . . . . 13

McFarlin v. McFarlin, 384 Ill. 428, 51 N. E. 2d 520, 521 . 13

McGowin v. McGowin, 122 Fla. 394, 165 So. 274, 275, 276 ..... 13

Melton v. Jenkins, 50 Ga. App. 615, 178 S. E. 754 ..... 13

Meredith v. Van Oosterhout, 286 F. 2d 216 (8th Cir. 1960), cert. den. 365 U. S. 835 ..... 10, 24

Parker Bros. v. Fagen, 68 F. 2d 616, 617 ..... 13

Perkins v. United States Fidelity & Guaranty Co., 433 F. 2d 1303 (5th Cir. 1970) ..... 10, 21, 25

Pierson v. Ray, 386 U. S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) ..... 14, 29

Potter v. LaMunyon, 389 F. 2d 874 (10th Cir. 1968) ... 22

Quindlen v. Hirschi, 284 P. 2d 273 (Okl. 1955) ..... 10, 22

Randall v. Brigham, 74 U. S. 285 (1869) ..... 22

Ray v. Huddleston, 212 F. Supp. 343 (W. D. Ky. 1963) aff'd 327 F. 2d 6) ..... 11, 26

Rhodes v. Houston, 202 F. Supp. 624 (D. C. Nebr. 1962) ..... 9, 14

Schmidt v. Degen, 376 F. Supp. 664 (E. D. Pa. 1974) ... 25

Skolnick v. Campbell, 454 F. 2d 531 (7th Cir. 1971) ... 24, 25

Spires v. Botteroff, 317 F. 2d 273 (7th Cir. 1971) ..... 24, 28

Stift v. Lynch, 267 F. 2d 277 (7th Cir. 1959) ..... 24

Sullivan v. Kelleher, 405 F. 2d 486 (1st Cir. 1968) ..... 10, 11, 19, 26

Wade v. Bethesda Hospital, 337 F. Supp. 671, 356 F. Supp. 380 (S. D. Ohio, 1971-1973) ..... 27, 28

Waugh v. Bd. of Commissioners of Montgomery County, 115, N. E. 356, 64 Ind. App. 123 (1917) ..... 16

Williams v. Sepe, 47 F. 2d 913 (5th Cir. 1973) .... 10, 20, 26

Yates v. Hoffman Estates, 209 F. Supp. 757 (N. D. Ill. 1962) ..... 28



*United States Constitution.*

Amendment XIV, Sec. 1 ..... 3

*Federal Statutes.*

42 U. S. C. § 1983 ..... 3

42 U. S. C. § 1985(3) ..... 3, 8

*Indiana Constitution.*

Article 7, § 8 ..... 12

*Indiana Statutes.*

I. C. 1971, § 16-8-3-1 ..... 4, 8, 9, 16

I. C. 1971, § 16-8-4-2 ..... 4, 9, 17

I. C. 1971, § 33-4-4-3 ..... 4, 8, 9, 12

I. C. 1971, § 16-13-13-1, 2, 3 & 4 ..... 5

*Other.*

Black's Law Dictionary, Revised 4th Ed., 991, 992 ..... 13

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

**No. 76-1750**

---

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*VS.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

## BRIEF FOR THE PETITIONERS.

---

## OPINIONS BELOW.

---

To Plaintiffs' Complaint, Defendants, Warren G. Sunday, Harold D. Stump, John D. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D., and DeKalb Memorial Hospital, Inc. filed, among other responsive pleadings, Motions to Dismiss.

In his Memorandum of Decision and Order filed May 15, 1976, the United States District Court for the Northern District of Indiana, Fort Wayne Division, Jesse E. Eschbach, Judge, granted said motions stating that Defendant, Harold D. Stump, acting as a Circuit Court Judge in a State Court, was clothed with absolute judicial immunity and that Plaintiffs had no con-

stitutional claims which could be asserted against the remaining Defendants. The District Court's Memorandum of Decision and Order appears as *Sparkman* v. *McFarlin*, Civil No. F 75-129 (D. Ind., decided May 13, 1976). A copy of said Memorandum of Decision and Order was attached to Petitioners' Petition for Writ of Certiorari and is by that reference, incorporated herein.

An Appeal from the District Court's Order was taken by Plaintiffs to the United States Court of Appeals for the Seventh Circuit which Court, by Opinion rendered March 23, 1977 reversed the Judgment of the District Court and remanded the cause for further proceedings consistent with its Opinion. Said Opinion is reported at 552 F. 2d 172 (1977). A copy of said Opinion was attached to the Petition for Writ of Certiorari and is by that reference incorporated herein.

## JURISDICTION.

The Opinion of the Court of Appeals was rendered on March 23, 1977. The Petition for Writ of Certiorari was filed on June 9, 1977 and granted on October 3, 1977. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

## QUESTION PRESENTED.

Whether the duly elected Judge of the Circuit Court of DeKalb County, Indiana, a Court of original, exclusive jurisdiction in all cases at law and equity whatsoever, had jurisdiction to consider and approve a Petition presented by Ora E. McFarlin, the natural mother, sole parent and custodian of Linda Kay Sparkman, her mentally handicapped fifteen year old daughter, to have an operation for tubal ligation performed on said Linda Kay Sparkman, and whether said act of approval is clothed with judicial immunity from liability under the federal civil rights statutes.



## CONSTITUTION, FEDERAL AND STATE STATUTES.

United States Constitution, Amendment XIV, Section 1 provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. § 1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in

ized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

Indiana Code § 16-13-13-1 (Repealed, 1974).

*Authorization.* Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician or surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1—16-13-13-6]. [Acts 1927, ch. 241, § 1, p. 713; 1937, ch. 244, § 1, p. 1164].

Relevant portions of Indiana Code § 16-13-13-2 (Repealed, 1974). *Petition by superintendent to governing board—Notice—Hearing—Order.* A copy of said petition shall be served upon the inmate together with a notice in writing designating the time and place in said institution or elsewhere, not less than thirty [30] days before the presentation of such petition to said board, when and where said board may hear and act upon such petition. Such inmate shall be produced before such board of [at] such hearing.

Any party to said proceedings shall have the right to be represented by counsel at such hearings, and to cross-examine all witnesses produced by and who testify at the instance of the opposite party.

Relevant portions of Indiana Code § 16-13-13-3 (Repealed, 1974). *Appeal to Circuit Court—Stay of proceedings.* From any order so entered by the Indiana council for



furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

I. C. 1971, § 16-8-3-1 provides in part:

"Medical or Surgical Treatment of Incompetent—Consent. —Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness or drug addiction may be given by the following persons, and such consent shall, on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:

(a) If the patient is an unmarried unemancipated minor, by one (1) parent having custody of such minor, Provided, That if there is no such parent, by the legal guardian of the minor, and further Provided That if the patient is a neglected child, by the agency of which the child has been made a ward of the juvenile court; . . ."

I. C. 1971, § 16-8-4-2 provides:

"Consent of Parent to Medical Treatment of Child.—Any person who is the parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

I. C. 1971, § 33-4-4-3 provides:

"*Jurisdiction.*—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organ-

mental health [commissioner of mental health] the said inmate or his guardian or parent or next friend shall, within thirty [30] days after the date of such order, have an appeal as of right to the circuit court of the county in which said institution is situated, . . .

The pendency of such appeal shall stay proceedings under the order of the council [commissioner of mental health] until the appeal be determined.

Indiana Code 16-13-13-4 (Repealed, 1974). *Appeal from circuit to Supreme Court—Act of 1927.*—Any party to appeal in the circuit court may within thirty [30] days after the date of the final order therein, apply for an appeal to the Supreme Court, which Supreme Court may grant or refuse such appeal and shall have jurisdiction to hear and determine the same upon the record of trial in the circuit court and to order the circuit court to make in the matter such order as may to the Supreme Court seem proper. The pendency of an appeal in the Supreme Court shall operate as a stay or proceedings under any orders of the board or of the circuit court until the appeal be determined by the Supreme Court. [Acts 1927, ch. 241, § 4, p. 713.]



## STATEMENT OF THE CASE.

When Plaintiff, Linda Kay Sparkman, was fifteen (15) years old, her mother, Ora E. McFarlin, determined that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for this decision were that, according to her mother, "Linda was somewhat retarded", unable to progress further than a 3rd grade scholastic level at school, unable to respond effectively to efforts at vocational training, that without her mother's consent or knowledge, Linda had been staying over night with older youths and men, and that her mother was unable to maintain control and observation over Linda to "prevent unfortunate circumstances". As a result, her mother sought the services of Defendant attorney, Warren G. Sunday, who prepared a certain "Petition To Have Tubal Ligation Performed On Minor and Indemnity Agreement." (A. 25).

By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This Petition was thereafter presented to Defendant, Harold D. Stump, Judge of the Circuit Court of DeKalb County, Indiana, who "approved" the *ex parte* application. Thereafter, on July 16, 1971, the three Defendant doctors performed a reversible tubal ligation on Linda at the Defendant Hospital.

In ruling on the Motions To Dismiss filed by all Defendants except Defendant, Ora E. McFarlin, the United States District Court For the Northern District of Indiana, Fort Wayne Division, held, with respect to the question here presented, that the only State action involved was that of Judge Harold D. Stump as Judge of the DeKalb Circuit Court, Indiana, "approving" Defendant, Ora E. McFarlin's Petition and held further that since the Circuit Courts of Indiana are Courts of general juris-

diction having "original, exclusive jurisdiction in all cases at law and in equity whatsoever" (I. C. 1971 § 33-4-4-3), Judge Harold D. Stump had jurisdiction in his Court to consider a Petition For Tubal Ligation; and although said "approval" may in retrospect have appeared to have been premised on an erroneous view of the law, the fact that subject matter jurisdiction resided in Judge Harold D. Stump, clothed the act with absolute judicial immunity from liability under 42 U. S. C. § 1985(3) or under the Fourteenth Amendment.

The United States Court of Appeals For the Seventh Circuit, by Opinion dated March 23, 1977 (p. A8 Appendix—Petition For Writ of Certiorari), reversed. Ignoring the statute conferring general jurisdiction upon the DeKalb Circuit Court (I. C. 1971 § 33-4-4-3) which states: ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer and ignoring those statutes providing for parental consent to perform surgery upon a minor (I. C. 1971, § 16-8-3-1, 2 and 3), the Court of Appeals without citing any authorities therefor, held, as a matter of law, that "a claim must be characterized as a case in law or in equity in order to come within the statute" (p. A 11, Appendix to Petition For Writ of Certiorari).



## SUMMARY OF ARGUMENT.

In the year 1971 when DeKalb Circuit Court Judge, Harold D. Stump, undertook to sign the Approval, the General Jurisdiction Statute, I. C. §33-4-4-3 was in effect. This gave the Judge jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

In 1971 there was likewise in existence the statutes at I. C. § 16-8-3-1 and I. C. § 16-8-4-2 which provided for medical or surgical treatment of an incompetent and that consent for such treatment may be given by the parent having custody of such minor. The statutes further provide that any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery.

The General Jurisdiction Statute had never been construed in any narrow fashion by any Indiana court prior to 1975. Nor had the statute conferring the right to consent by a parent for surgery on a minor child been construed so as to prevent that statute from embracing sterilization. Additionally, those statutes concerning authority to consent to medical treatment of an incompetent (I. C. § 16-8-3-1 and I. C. § 16-8-4-2) do not provide, by their terms, for any formal context in which the consent is to be given.

Judges are immune from civil actions for acts performed in the course of their official functions. *Bradley* v. *Fisher*, 80 U. S. 335, 20 L. Ed. 646 (1871). Unless an act is done in the clear absence of all jurisdiction and this fact is known to the judge, there is no immunity. *Bradley* v. *Fisher, supra, Rhodes* v. *Houston*, 202 F. Supp. 624 (D. C. Nebr. 1962).

Whenever a court's general jurisdiction over the subject-matter is invoked, the court has the right to determine if it has the power to determine if it has jurisdiction to proceed to dispose of the matter. *Bradley* v. *Fisher, supra; Baltimore & Ohio Railway Co.* v. *Freeze,* 82 N. E. 761, 169 Ind. 370 (1906); *Johnson* v. *McCoy,* 278 F. 2d 37, 40 (9th Cir. 1960). In the year 1971, Judge Stump clearly had jurisdiction over the subject-matter of sterilization and he had the further right to determine if he had jurisdiction to act on the Petition in question. *A. L.* v. *G. R. H.,* 325 N. E. 2d 501 (Ind. App. 1975). It was four years later, that the Indiana Appellate Court held that parents may not be authorized by courts of general jurisdiction to cause tubal ligations to be performed on their children. *A. L.* v. *G. R. H., supra.* That decision did not, however, remove jurisdiction of the subject-matter from the Circuit Courts of Indiana. *Id.*

Judicial immunity is not lost through procedural errors, irregularities or deficiencies of a circuit court judge's acts. *Sullivan* v. *Kelleher,* 405 F. 2d 486 (1st Cir. 1968); *Jacobson* v. *Schaefer,* 441 F. 2d 127 (7th Cir. 1971).

There are numerous cases holding that so long as subject-matter jurisdiction of a court is invoked, subsequent procedural irregularities will not destroy the court's immunity. *Williams* v. *Sepe,* 47 F. 2d 913 (6th Cir. 1973); *Perkins* v. *United States Fidelity & Guaranty Co.,* 433 F. 2d 1303 (5th Cir. 1970); *Quindlen* v. *Hirschi,* 284 P. 2d 723 (Okl. 1955).

The act of Approval of the Petition in question was done by Judge Stump in the exercise of his judicial function. The act of Approval had not been proscribed at the time of its occurrence. *Meredith* v. *Van Oosterhout,* 286 F. 2d 216 (8th Cir. 1960), *cert. den.* 365 U. S. 835. The act of Approval had not been proscribed at the time of its occurrence.

The policy underlying the doctrine of judicial immunity requires that its application not depend on determination of nice questions of jurisdiction. *Sullivan* v. *Kelleher, supra; Williams* v.



*Sepe, supra; Ray* v. *Huddleston,* 212 F. Supp. 343, 345-46 (W. D. Ky. 1963), aff'd. 327 F. 2d 61. The terms "jurisdiction" and "judicial function" are given broad definition. *Sullivan, supra.*

Only clear absence of all jurisdiction will bring about a denial of immunity. *Bradley* v. *Fisher, supra.* Further, the fact of absence of jurisdiction must be known to the court, *Bradley* v. *Fisher, supra.* No evidence nor inference of such knowledge is here present. In fact, Judge Stump at all times possessed subject-matter jurisdiction over the subject of the Petition in question. *A. L.* v. *G. R. H., supra*

The Opinion of the Court of Appeals is erroneous in that it ignores the clear principles set down by *Bradley* v. *Fisher, supra,* to which principles the Court of Appeals was bound. If Judge Stump erred at all, it was a good faith error entitled to judicial immunity.

## ARGUMENT.

### I.

**THE DEKALB COUNTY CIRCUIT COURT OF WHICH HAROLD D. STUMP IS PRESIDING JUDGE WAS AT ALL TIMES PERTINENT TO THIS LITIGATION A COURT OF ORIGINAL, EXCLUSIVE, GENERAL JURISDICTION OVER ALL CAUSES, MATTERS AND PROCEEDINGS EXCEPT THOSE EXPRESSLY REMOVED FROM IT.**

As Judge of the Circuit Court of DeKalb County, Indiana, (Complaint, p. 3, ¶ 6) Appellant, Harold D. Stump's, authority is derived from the following:

Art. 7, § 8 of the Constitution of the State of Indiana provides:

> "The Circuit Court shall have such and criminal jurisdiction as may be prescribed by law."

Indiana Code § 33-4-4-3 provides:

> "Jurisdiction. Said court shall original, exclusive jurisdiction in all cases at law and in equity whatsoever as in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon Justices of the Peace. It shall also have exclusive jurisdiction of the settlement of decedent's estates and of guardianships: provided, however, that in counties in which Criminal or Superior Courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such Appellate jurisdiction as may be conferred by law, *and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.* (Emphasis added.) [Acts 1881 (Special Session), Chapter 24, Section 3, page 102.]"



"Jurisdiction", a fundamental generic term has been defined variously in *Black's Law Dictionary*, revised 4th Ed., p. 991 as follows:

> The word is a term of large and comprehensive import, and embraces every kind of judicial action. *Federal Land Bank of Louisville, Kentucky* v. *Crombie*, 258 Ky. 383 80 S.W. 2d 39, 40; *McGowin* v. *McGowin*, 122 Fla. 394 165 So. 274, 275, 76. . . .
>
> (P. 992) "Jurisdiction of subject-matter" means jurisdiction of class of cases to which particular case belongs. *McFarlin* v. *McFarlin*, 384 Ill, 428, 51 N.E. 2d 520, 521;. . . . It is power to: ajudge concerning general question involved, *Parker Bros.* v. Fagen, C.C.A. Fla., 68 F2d 616, 617 . . . deal with general abstract question, to hear particular facts in any case relating to such question, and to determine whether they are sufficient to invoke exercise of power, *Melton* v. *Jenkins*, 50 Ga. App. 615, 178 S.E. 754. . . .
>
> "Jurisdiction of the person" is power to subject parties in a particular case to decisions and rulings made in such case, *Collins* v. *Powell*, 224 IA. 1015, 277 N.W. 477, 481.

In attempting definition by way of exclusion, *Black's, supra*, says at p. 992:

> Its [jurisdiction] does not depend either upon the regularity of exercise of power to hear and determine or upon correctness or rightfulness of decision made, *Mattice* v. *Kingston Chess Co.*, 33 N.Y. Supp. 2d 799, 801 . . .; or on the ability of the judge to reason correctly or to act incorruptibly. *In Re: Gardiner's Estate*, 45 Cal. App. 2d 559, 114 P. 2d 643.

### II.

**THE DOCTRINE OF JUDICIAL IMMUNITY PROTECTS A JUDGE FROM CIVIL LIABILITY FOR ANY ACT WITHIN HIS JURISDICTION DONE IN THE EXERCISE OF HIS JUDICIAL FUNCTION.**

Controlling principles involved in the doctrine of judicial immunity are as follows:

As a general rule judges are immune from civil actions for acts performed in the course of their official functions. This was the settled law of England and is similarly accepted in this country. *Bradley* v. *Fisher, supra.*

The passage of the Federal Civil Rights Act did not abrogate this traditional immunity. *Pierson* v. *Ray,* 386 U. S. 547, 87 S. Ct. 213, 80 L. Ed. 2d 288 (1967).

An exception to the rule of judicial immunity exists which is founded upon a distinction between *excess* of jurisdiction and the absence of all jurisdiction. *Bradley* v. *Fisher, supra.* Where there is jurisdiction over the subject matter, there is immunity, and even though a judge's action is in excess of jurisdiction the immunity remains.

Where the act is done in the *clear absence* of all jurisdiction and this is known to the judge, there is no immunity. *Bradley* v. *Fisher, supra.*

*Cf. Rhodes* v. *Houston,* 202 F. Supp. 624 (D. C. Nebr. 1962). *Bradley* v. *Fisher* holds: (20 L. Ed. 651))

> ". . . that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority and for the exercise of such authority when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."



## III.

## A COURT OF GENERAL JURISDICTION POSSESSES THE POWER OF DETERMINING ITS OWN JURISDICTION.

By way of example and of particular importance to the facts of this case is the following pronouncement contained in *Bradley* v. *Fisher, supra:* (20 L. Ed. 651) . . .

> "Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But, if on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which is not by the law made an offense and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked."

This statement provides two fundamental foundational precepts: (1) unless the act of a judge of a court of general jurisdiction has been proscribed, that is, his jurisdiction to act limited or removed by statute or by judicial fiat, the act of a judge, sitting in his judicial capacity, is clothed with judicial immunity; and (2) given subject-matter jurisdiction, each court has jurisdiction to determine its own jurisdiction.

The latter fundamental rule is established Indiana and federal law.

"Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject matter of the action. It is well settled that, when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A decision on a jurisdictional question, either expressly or impliedly given by a tribunal, has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceedings, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected." *Baltimore & Ohio Railway Company* v. *Freeze*, 82 N.E. 761, 169 Ind. 370 (1906).

Cf. *Waugh* v. *Board of Commissioners of Montgomery County*, 115 N.E. 356, 64 Ind. App. 123 (1917).

See also *Johnson* v. *McCoy*, 278 F. 2d 37, 40 (9th Cir. 1960).

As to the fundamental rule (1) stated above, Respondents have produced no judicial decision or statute proscribing, in the year 1971, the act of Judge Stump of which they complained nor limiting his jurisdiction over the subject matter contained in the Petition in question.

"Jurisdiction" to hear Ora McFarlin's Petition was present in the DeKalb Circuit Court by virtue of the broad jurisdictional powers conferred upon it [I. C. § 33-4-4-3]. The Federal District Judge in its Memorandum of Decision and Order dismissing Respondents' Complaint found that although Judge Stump's "approval" of Mrs. McFarlin's Petition may have been premised on an erroneous view of the law, "Judge Stump surely had jurisdiction to consider the Petition and to act thereon" (Appendix to Petition for Writ of Certiorari, A6).

Likewise, in the year 1971, there was in full force and effect in the State of Indiana the following statutes:

"I.C. § 16-8-3-1. Medical or Surgical Treatment of Incompetent—Consent. Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual dunkenness or drug addiction may be given by the following persons and such consent shall on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:



(a) If the patient is an unmarried, unemancipated minor, by one (1) parent having custody of such minor, provided, that if there is no such parent, by the legal guardian of the minor, and further provided that if the patient is a neglected child, by the agency of which the child has been made a ward of the Juvenile Court; . . ."

and

"I.C. § 16-8-4-2. Consent of Parent to Medical Treatment of Child. Any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

Although these statutes were later held not to permit parents to consent to tubal ligation, that pronouncement had not been made prior to 1971. Prior to that year no judicial determination had been made in the State of Indiana construing or delimiting what surgery might be consented to by the parents or approved by a Circuit Court Judge.

Nor do these statutes provide, by their terms, any formal or procedural requirements for giving the consent. By submitting her Petition, "Mrs. McFarlin consented to the performance of the operation. . . ." (Memorandum of Decision and Order, Appendix to Petition for Writ of Certiorari, p. A3).

The observation by the Court of Appeals that ". . . the Petition and Order [*sic*] were never filed in court" suggests that filing in court in an apparently formal way is an absolute antecedent requirement to Judge Stump's having jurisdiction to act in approving the Petition is therefore erroneous.

In 1975, the Indiana Appellate Court in *A. L.* v. *G. R. H.*, 325 N. E. 2d 501 (Ind. App. 1975) held that parents may not be authorized by courts of general jurisdiction to cause tubal ligations to be performed on their children under any circumstances. The Decision did not, however, remove jurisdiction of such subject matter from the circuit courts. It simply issued a judicial fiat prohibiting such authorizations. Nowhere is it suggested that should such a Petition be presented to a judge of a circuit court in any county in Indiana that he did not have jurisdiction to deal with the Petition.

## IV.

## JUDICIAL IMMUNITY IS NOT LOST THROUGH PROCEDURAL ERRORS, IRREGULARITIES OR DEFICIENCIES OF A CIRCUIT COURT JUDGE'S ACTS. AN "APPROVAL" IS NOT AN "ORDER."

Circuit Court judges in Indiana, and specifically Judge Stump as Circuit Court Judge of DeKalb County, are frequently called upon in their judicial capacities to approve matters with which they are confronted. The statute conferring jurisdiction on circuit courts (I. C. § 33-4-4-3) provides:

> ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

Judicial notice is to be taken of the routine practices of state courts of general jurisdiction in approving settlements of claims of minors for a personal injury upon the presentation of a petition requesting such approval by one or both of the natural parents or guardians of the minor and frequently in the minor's absence. Vital issues involving custody of minor children are frequently decided in the absence of the minor involved. If, in each such instance, guardians *ad litem* are required for such children who in turn would employ counsel, the judicial process would founder.



*Grow* v. *Fisher*, 523 F. 2d 875 (7th Cir.) (1975) held that an act of a prosecuting attorney in approving an affidavit which brought about the arrest of the plaintiff on charges which he knew were false and upon which each of the plaintiff was acquitted, was held to be an act entitling the prosecuting attorney to immunity from the consequences thereof. The court said:

> "The law of this circuit is clear. A state prosecutor has quasi-judicial immunity even where malice is alleged so long as he is acting within the scope of his prosecutorial discretion."

Surely if a prosecuting attorney acting within the scope of his prosecutorial discretion is immune from the consequences of his act of approval of an affidavit which he knows is false, a circuit court judge possessing original, exclusive general jurisdiction should be clothed with absolute immunity for the judicial act of approving the petition in question.

The fact that Judge Stump may have committed a procedural error does not deprive him of judicial immunity. In *Sullivan* v. *Kelleher*, 405 F. 2d 486 (1st Cir. 1968) a judge was sued for entering a default judgment evicting the plaintiff from his rented residence without giving him legal notice of the action although it was well-known that at the time the plaintiff was away from home on an extended trip. The court said:

> "For the soundest reasons of policy it has long been established that when a judge has general jurisdiction over the subject matter he is not civilly liable for acts done in the exercise of his judicial function. *Bradley* v. *Fisher*, supra. But this does not mean that judicial immunity hangs upon the determination of nice questions of jurisdiction which as the court pointed out in *Bradley* v. *Fisher*, at p. 352 can be 'some of the most difficult and embarrassing' that a judicial officer may be called upon to consider and decide. The distinction which must be observed is 'between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter."

In *Jacobson* v. *Schaefer*, 441 F. 2d 127 (7th Cir. 1971) County Judge Schaefer arbitrarily and shockingly withdrew from the amount of bail posted by plaintiff a sum to pay the fees of a court appointed attorney, and immediately thereafter found the plaintiff to be in default of his bail bond inasmuch as there was no longer the required amount on deposit, caused the plaintiff to be jailed and ordered that the deficiency could not be made up without court approval.

The court noted *Luttrell* v. *Douglas*, 220 F. Supp. 278 (7th Cir. 1963) holding that the doctrine of judicial immunity would not apply to the commission of a "clearly illegal act" on the part of the judge. The court noted that in *Luttrell*, the judge there had been specifically proscribed from performing the act of which he was guilty.

In applying the doctrine of judicial immunity to County Judge Schaefer, the court said:

> "(p. 130) We have found nothing in the Wisconsin Statutes which expressly grants to judges in criminal cases the authority to attach conditions to bail that do not directly relate to assuring the criminal defendant's appearance at trial. However, we think that, in terms of a judge's 'general jurisdiction over the subject matter', the defendant judge here probably had minimal jurisdiction to attach at least some conditions to bail. (Citing cases) . . . Obviously, the use of his jurisdiction to coerce reimbursement of allegedly illegal fees were the clear abuse of power, especially when other channels existed for recovery of any such fees which might have been owed. . . . But the fact that an abuse occurred did not destroy the defendant judge's original jurisdiction as that term has been defined in the judicial immunity cases. *Unlike the Luttrell case, there was no definitive statutory or common law bar to the present judge's action. Under these circumstances the judicial immunity doctrine must be applied.*" [Emphasis supplied.]

In *Williams* v. *Sepe*, 47 F. 2d 913 (5th Cir. 1973), it was established that Judge Sepe failed to comply with the procedure



for prosecuting an indirect contempt of court by failing to give written notice of the criminal contempt charged. Plaintiff alleged that such failure resulted in an absence of subject matter jurisdiction and the loss of the defense of judicial immunity. The court said:

> "While it may be true that the procedural irregularities would necessitate a reversal of a conviction if one had been obtained on the facts of this case . . . the test for the abrogation of judicial immunity is whether there is a *clear* absence of all jurisdiction over the subject matter. *Bradley* v. *Fisher*, supra. The policy underlying the doctrine requires that its application not depend on the determination of 'nice questions of jurisdiction'. *Sullivan* v. *Kelleher*, supra. The defects in the procedure employed in this case will not support a conclusion that there was a clear absence of all jurisdiction."

*Perkins* v. *United States Fidelity & Guaranty Co.*, 433 F. 2d 1303 (5th Cir. 1970) involved an action by a plaintiff against a judge of a probate court which had, upon application of plaintiff's wife to cause plaintiff to be committed to the Alabama State Hospital for the insane, signed a certificate of mental disqualification and ordered plaintiff committed. No hearing was held and plaintiff *Perkins* received no notice of any commitment proceedings.

Plaintiff alleged absence of jurisdiction and that the act of the judge was ministerial as opposed to being judicial. In rejecting the plaintiff's arguments, the court said:

> "The clear words of the statute grant the Probate Court jurisdiction over the application for commitment. Assuming that the Probate Judge did not provide Appellant with all the procedural safeguards provided in the statute, that would not destroy the jurisdiction of the court to hear and decide the case. Cf. *Headley* v. *Ball*, 284 Ala. 488 226 So. 2d 90 (1969)."

In *Potter* v. *LaMunyon*, 389 F. 2d 874 (10th Cir. 1968) the court noted that the State of Oklahoma had adopted the rule set down in *Bradley* v. *Fisher, supra* including:

> "(p. 876) The distinction to be drawn is between utter and complete lack of jurisdiction and errors in the exercise of a conferred general jurisdiction."

Among the cases cited in *Potter* v. *LaMunyon*, is *Quindlen* v. *Hirschi*, 284 P. 2d 723 (Okl. 1955) which involved a factual situation strinkingly similar to the one occupied by Respondents in this case. In *Quindlen*, the court held that a judge with jurisdiction to commit for insanity was not liable civilly for doing so erroneously by failing to serve legal notice on a 16 year old minor and failing to appoint a guardian *ad litem* to protect her interests. Quoting from *Comstock* v. *Eagleton*, 11 Okl. 487, 69 P. 955, 957, 196 U. S. 99, the court made the inquiry:

> " 'Under what circumstances can a judge of the probate court be held liable to a civil action for damages for an act done by him in his capacity as judge? Nothing is more essential and important than that the judiciary shall be independent. . . .' "

All cases cited by plaintiff were deemed not applicable "for the reason that they involved situations where the judge was wholly without jurisdiction" (p. 725).

Prior to his rendering the Opinion in *Bradley* v. *Fisher*, Mr. Justice Field had also written the Opinion in *Randall* v. *Brigham*, 74 U. S. 285 (1869), decided two years earlier. Attorney Randall took unconscionable advantage of a client. A letter from the ship's captain to a grand jury foreman disclosed the misconduct. The letter was shown to the judge. The judge, apparently taking the facts disclosed in the letter as being absolutely true sent for Randall and in open court notified him, orally, that his conduct and fitness would be considered five days hence. Five days hence, Randall was disbarred by the court. He was charged with no formal complaint, no specifications of charges



and given no formal citation. This failure, he advised, deprived the court of jurisdiction over him.

Justice Field noted that Superior Courts of Massachusetts are courts of general jurisdiction. He likewise noted that admission and removal of attorneys to practice before the courts are judicial acts. He stated:

> "Now, it is a general principle applicable to all judicial officers that they are not liable to a civil action for any judicial act done within their jurisdiction." (p. 291).

Later on in the Opinion (p. 293), the court said:

> ". . . the information imparted by the letter was sufficient to put into motion the authority of the court."

All of the foregoing cases sustain the fundamental principle that unless an act by a judge in a court of general jurisdiction has been specifically proscribed, it is clothed with judicial immunity so long as the matter with which the court was confronted gives the court subject-matter jurisdiction to act upon it.

## V.

**AT ALL PERTINENT TIMES, JUDGE STUMP ACTED IN HIS JUDICIAL CAPACITY. JUDICIAL IMMUNITY EXISTS FOR ANY ACT DONE BY A JUDGE IN THE EXERCISE OF HIS "JUDICIAL FUNCTION".**

The Approval appended to the Petition was a judicial function of Harold D. Stump solely in his role as Judge of the DeKalb Circuit Court. It cannot be seriously contended that the Petition was presented to him in any other capacity. Assertions by Respondents in their Appellate Brief to the Court of Appeals that Judge Harold D. Stump was not acting under the jurisdiction conferred upon him as a Circuit Court Judge at the time of his Approval of the Petition are erroneous.

In 1971, there was but one court of general jurisdiction in DeKalb County, to-wit: the Circuit Court over which Judge

Stump presided. Under those conditions, all matters coming before that court were subject to the general jurisdiction of said court pursuant to I. C. § 33-4-4-3. See *Harris* v. *Souder,* 119 N. E. 2d 8 (Ind. Supreme Court 1954).[1]

Although some of the averments in the Petition might be descriptive of acts of juvenile delinquency, the Petition was not in any way construed as charging a criminal offense, adult or juvenile. The Petition was acted upon by Judge Harold D. Stump in the exercise of his general, exclusive jurisdiction.

In addition to cases which define judicial immunity in terms of "jurisdiction", there are also cases which define it in terms of "judicial function". *E.g. Skolnick* v. *Campbell,* 454 F. 2d 531 (7th Cir., 1971); *Stift* v. *Lynch,* 267 F. 2d 277 (7th Cir. 1959); *Barksdale* v. *Ryan,* 398 F. Supp. 700 (N. D. Ill. 1974); *Meredith* v. *Van Oosterhout,* 286 F. 2d 216 (8th Cir. 1960), *cert. den.* 365 U. S. 835.

In *Meredith* v. *Van Oosterhout, supra,* at 220, the court said:

> ". . . A judge may not be liable civilly for acts done in the exercise of his judicial functions, no matter how illegal, erroneous or irregular the acts may be. The rule is applicable even if the acts be performed maliciously, correctly or in excess of his jurisdiction. Sound considerations of public policy require that the judiciary be independent, with freedom to make unbiased decisions in no way controlled or influenced by fear of personal consequences, such as civil suits for imagined or even real impropriety."

A finding of the complete absence of "judicial function" is extremely rare. *E.g. Spires* v. *Botteroff,* 317 F. 2d 273 (7th Cir. 1971), (self-disqualified judge subsequently interfering with hearing, knowingly making a false affidavit, and intimidating a public defender); *Gregory* v. *Thompson,* 500 F. 2d 59 (1974) (assault); *cf., Skolnick* v. *Campbell, supra* (assault).

1. *Hicks* v. *State,* 230 N. E. 2d 757 (Ind. S. Ct. 1957) only partially overruled *Souder* in that it held where a juvenile offender comes before the Circuit Court's criminal jurisdiction, the court must sit as Juvenile Court in dealing with him. Here Judge Stump was exercising civil jurisdiction.



A judge's decision-making, whatever its form, is well within the confines of "judicial function". *E.g. Perkins* v. *U. S. F. & G. Co., supra* (responsibility of deciding whether a person should be committed to state mental institution held to be "judicial function" protected by immunity); *Barksdale* v. *Ryan, supra* (ordering bail money to be released to an allegedly unauthorized party held to be within the "judicial function" and hence protected by judicial immunity).

In *Schmidt* v. *Degen,* 376 F. Supp. 664, 669 (E. D. Pa. 1974), the court observed:

> ". . . [a] judge's decision-making function is by definition 'discretionary.' For this reason, the 'discretionary'—'ministerial' distinction is seldom employed in the judicial context."

Therefore, acts done in the exercise of a judge's "judicial function '—of which the giving of an approval is a part,—are entitled to judicial immunity.

## VI.

**IN APPLYING THE DOCTRINE OF JUDICIAL IMMUNITY, THE TERMS "JURISDICTION" AND "JUDICIAL FUNCTION" ARE GIVEN BROAD DEFINITION.**

In *Apton* v. *Wilson,* 506 F. 2d 83, 90 (D. C. Cir. 1974), the court said:

> "The immunity of judges has long been settled. The judge is not liable for any injuries resulting from acts within his jurisdiction, and jurisdiction is construed broadly so that a judge will not be held liable unless he acts without color of authority."

With respect to "judicial function", *Skolnick* v. *Campbell supra,* held:

> "The standard for defining conduct encompassed by the 'judicial function' has been broadly construed in this circuit. . . ."

In *Williams* v. *Sepe, supra,* at p. 914, the court said:

> ". . . the policy underlying the doctrine [of judicial immunity] requires that its application not depend on the determination of 'nice questions of jurisdiction'." *Sullivan* v. *Kelleher, supra.*

The case of *Ray* v. *Huddleston,* 212 F. Supp. 343, 345-46, (W. D. 1963), *aff'd.* 327 F. 2d 61, suggests the tenor to be adopted by a reviewing court regarding subject-matter jurisdiction of a lower court of general jurisdiction:

> "Subject-matter jurisdiction is very often a question as to which there is no clear and compelling answer and it is not apparent how the interests of the public in immunity of judicial decisions is any less demanding in this field than in any other. . . . On the other hand, the illustration for the exception to immunity offered in *Bradley* v. *Fisher,* is convincing that in some cases at least it may have a solid basis. A probate court assuming to administer the criminal laws would surely surrender its immunity but in such a case jurisdiction would be so clearly lacking as to constitute usurpation rather than a mistaken overreaching. This concession to the exception in the rule of immunity may well call for some exploration as to the basis of jurisdiction but it does not allow detailed scrutiny and independent judgment. . . . This court is therefore not permitted to undertake a search for error in the county judge's determination on jurisdiction but will only look for some plausible basis for it."

## VII.

## ONLY CLEAR ABSENCE OF ALL JURISDICTION OVER THE SUBJECT-MATTER AND THAT FACT KNOWN TO THE JUDGE WILL BRING ABOUT A DENIAL OF IMMUNITY.

In the year 1971, there was no proscription, by statute or judicial fiat, depriving Judge Harold D. Stump of jurisdiction over the subject-matter presented in the Petition in question. The statutory scheme referred to by the Court of Appeals (Appendix to Petition for Writ of Certiorari, A12) does not, by its terms, negate sterilization under any other circumstances. Said scheme does not, by its terms, proscribe sterilization of persons other than institutionalized persons.



As previously stated in this brief, *A. L.* v. *G. R. H., supra,* does not remove jurisdiction from Circuit Courts to consider matters concerning sterilization but simply removes the authority from the court which would invest parents with the power to cause their children to be sterilized. From and after April 10, 1975, all Circuit Court Judges in the State of Indiana, including Judge Harold D. Stump, were aware of the fact that the decision in *A. L.* v. *G. R. H., supra,* deprived them of authority to permit parents the power to sterilize their children, but said courts were not deprived of jurisdiction to consider and act upon petitions requesting such authority.

No statute or judicial decision was in effect in 1971 which deprived Judge Stump of his jurisdiction to deal with the Petition for Tubal Ligation or which proscribed him from giving his approval. Clear absence of all jurisdiction to thus act could not, therefore, have been known to him for the reason that he had, in fact, possession of jurisdiction over the subject-matter of the Petition.

*Wade* v. *Bethesda Hospital,* 337 F. Supp. 671, 356 F. Supp. 380 (S. D. Ohio 1971-1973) presents a situation whereby a Probate Court Judge, exercising limited jurisdiction, ordered the sterilization of Carolyn Wade upon the petition of a county welfare worker. Statutory authority for such sterilization had been specifically repealed years prior to the issuing of the order. As a Probate Court, the judge in *Wade* possessed limited jurisdiction, was not a court of general, exclusive jurisdiction and his subject-matter jurisdiction to act at all had been removed by the repeal of the statute. As is pointed out by the Federal District Judge in his Memorandum of Decision and Order (Appendix to Petition for Writ of Certiorari, A7):

> "No such limited jurisdiction is in issue in this case."

The only situations in which judges have not been granted judicial immunity are those, as in *Wade* v. *Bethesda Hospital, supra,* in which the act of the judge has been specifically proscribed, the court's jurisdiction specifically removed or where the judge's act was not a judicial function. *Luttrell* v. *Douglas, supra; Spires* v. *Botteroff, supra; Lynch* v. *Johnson,* 420 F. 2d 818 (6th Cir. 1970); *Yates* v. *Hoffman Estates,* 209 F. Supp. 757 (N. D. Ill. 1962).

## VIII.

**THE OPINION OF THE COURT OF APPEALS IS ERRONEOUS BECAUSE IT IGNORES, CONFLICTS WITH AND REPRESENTS AN UNWARRANTED DEPARTURE FROM THE STATUTORY AUTHORITIES OF THE STATE OF INDIANA AND THE PRECEDENT OF THIS COURT.**

An examination of the Petition in question discloses that the court's Approval does not obligate Linda Sparkman to submit to sterilization or obligate the doctor or hospital to perform the tubal ligation. The Petition itself does not expressly ask for anything but the court's approval, referring to tubal ligation. Clearly, the Petition falls within the area defined by the statute conferring jurisdiction (I. C. 1971, § 33-4-4-3), "of all other causes, matters and proceedings . . ." upon the DeKalb Circuit Court. The Court of Appeals ignores this fact. Previous discussion in this Brief sets out the existence of other statutes permitting a mother to consent to have surgery performed upon her minor, that this consent was given by Ora McFarlin, and that the court had jurisdiction to thereby act upon said Petition because of its general jurisdiction over the subject-matter thereof. Again, the presence and effect of the statute is ignored by the Court of Appeals.

Additionally, as previously stated, the Court of Appeals' suggestion that because "the Petition and Order were never filed in court" Judge Stump placed himself, presumably, in a position of clear absence of jurisdiction to deal with the Petition. This



statement is unsupported by any authority and is an unreasonable conclusion.

When the Court of Appeals construed the effect of *A. L.* v. *G. R. H., supra,* it abandoned all pretence of considering whether Judge Stump had jurisdiction over the Petition in question. The court, in *A. L.* v. *G. R. H., supra,* had to have jurisdiction to deal with the mother's Petition at all. The Court of Appeals' statement "if the opinion implies anything, it is that no jurisdiction to order sterilization exists" (Appendix to Petition for Writ of Certiorari, p. A13) confuses the merits of the action with the court's jurisdiction to deal with it.

For these reasons and those previously set forth in this Brief, the Opinion of the Court of Appeals is erroneous. If allowed to stand, the standards set forth for the application of the doctrine of judicial immunity in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra,* would be rendered meaningless. The Court of Appeals would in their place substitute standards which would require a court of general jurisdiction to act only pursuant to some specific and affirmative legislative or judicial grant of authority before jurisdiction could be found.

It is respectfully submitted that if the standards for the application of the doctrine of judicial immunity set forth in *Bradley* v. *Fisher, supra,* founded as they are upon the concept of "jurisdiction", are to be changed, that change should be brought about by the legislatures of the states who conferred jurisdiction upon its county courts originally. If the people of the State of Indiana choose to restrict or limit the jurisdiction of their county courts, that should be their sole prerogative, as well as the converse. To permit the Court of Appeals' Opinion to stand as declarative of the standards for the application of the doctrine of judicial immunity in the State of Indiana is unreasonable.

## CONCLUSION.

The pronouncements set forth in *Bradley* v. *Fisher, supra,* more than one hundred years ago remain unchanged and are here again repeated:

> "But where jurisdiction over the subject-matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case. Although upon the correctness of his determination in these particulars the validity of his judgments may depend." (20 L. Ed. 651.)

*Bradley* further requires that in the remote event of a clear absence of jurisdiction over the subject-matter, that fact must be known to the judge. Nothing in the record presented to the Circuit Court of Appeals permitted that court to reach the conclusion that Judge Harold D. Stump knew that he had no jurisdiction to consider the Petition in question nor to act thereon.

Approval of the Petition was a judicial act undertaken by the court pursuant to the powers conferred upon it by the statutes of the State of Indiana hereinbefore set forth. The bland, unsupported statement by the Court of Appeals, to-wit: "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take.", (Appendix to Petition for Writ of Certiorari, p. A14) is typical of the sophistry which characterizes the entire Opinion and, like the entire Opinion itself, contrary to all established precedent. The Memorandum of the United States District Court for the Northern District of Indiana, Fort Wayne Division (Appendix to Petition for Writ of Certiorari, pp. A1 through 7), properly found that Judge Stump possessed the jurisdiction to act, that the act was a judicial function, and that Judge Stump was therefore immune.



Implicit within the policy foundations of the doctrine of judicial immunity lies a recognition that human beings invariably fail in their attempts to mete out as nebulous a thing as "justice" in every case. Additionally, there is a recognition that judges are entirely human. Lofty pronouncements framed in the most prolix phrases betray their own insufficiency and paucity of substance.

Judges occupy positions in our society upon which the people, through their constitutions and statutes, have conferred more authority than upon any human beings on the face of the earth who live in democratic societies. Judges, by their judicial pronouncements, perpetrate an aura of deism which surrounds the bench. The aura is essential to the maintenance of respect for the judicial institution and that respect must be maintained even though an individual act committed by a man in the judicial robe be lacking in a demonstration of fervent intellectual analysis of the consequences thereof.

If the critics of the relatively simplistic doctrine of judicial immunity are to have their way, Judge Stump would be held civilly liable because he failed to implement fundamental procedures of notice, appointment of guardian *ad litem* and holding a formal hearing. That failure, it must be inferred occurred only because the judge was asked to approve and not order. Depending upon the focus of the analysis of that distinction, one may attach great weight and considerable compassion to the act since it required nothing of anybody and carried with it no power of sanction should it have been ignored. It required no giving of notice and could not have been the basis of an appeal.

No supportable contention has been made that Judge Stump acted other than for the child's best interests. To hold that he acted in the clear absence of all jurisdiction and with knowledge of that fact, is without basis in law or fact.

The relief Petitioners seek is a reversal of the Decision of the Court of Appeals and an affirmation of the Order entered

May 13, 1976 by the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Respectfully submitted,

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,
*Counsel for Petitioner,*
*Harold D. Stump.*

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank
Tower,
Fort Wayne, Indiana 46802,
219-423-9551,
*Counsel for Petitioners, John*
*Hines, M.D., Harry M. Covell,*
*M.D. and Warren G. Sunday.*

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

No. 76-1750

In the

# Supreme Court of the United States

October Term, 1977

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

*Petitioners,*

*vs.*

LINDA KAY SPARKMAN and LEO SPARKMAN,

*Respondents,*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## BRIEF FOR RESPONDENTS

---

RICHARD H. FINLEY
124 East Rush Street
Kendallville, Indiana 46755
(219) 347-0600

EUGENE GRESSMAN
Suite 701
1828 L Street, N.W.
Washington, D. C. 20036
(202) 466-8400

*Counsel for Respondents*

December 16, 1977

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

## INDEX

QUESTION PRESENTED . . . . . 2

STATEMENT OF THE CASE . . . . . 2

SUMMARY OF ARGUMENT . . . . . 8

ARGUMENT:

I. A judge is immune from civil liability only as to those judicial acts performed in exercise of his jurisdiction . . . . . 10

II. In the total absence of any judicial proceeding having been invoked or even contemplated, Judge Stump's secret approval of the permanent sterilization must be deemed a non-judicial act as to which no judicial immunity attaches . . . . . 18

CONCLUSION . . . . . 25

## CITATIONS

**Cases:**

*Alzua v. Johnson*,
231 U.S. 106 (1913) . . . . . 13

*Barr v. Matteo*,
360 U.S. 564 (1959) . . . . . 16

*Bradley v. Fisher*,
13 Wall (80 U.S.) 335 (1872) . . . . . 8, 11, 12, 13, 20

*Doe v. McMillan*,
412 U.S. 306 (1973) . . . . . 16

Page

*Ex parte Virginia*,
100 U.S. 339 (1879) . . . . . 10, 15, 18

*Gregory v. Thompson*,
500 F.2d 59 (9th Cir. 1974) . . . . . 8, 10, 16, 17

*Imbler v. Pachtman*,
424 U.S. 409 (1976) . . . . . 12

*Joyce v. Hickey*,
337 Mass. 118, 147 N.E.2d 187 (1958) . . . . 10, 16, 21

*Lynch v. Johnson*,
420 F.2d 818 (6th Cir. 1970) . . . . . 10, 18

*Penn v. Eubanks*,
360 F. Supp. 699 (M.D.Ala. 1973) . . . . . 18

*Pierson v. Ray*,
386 U.S. 547 (1967) . . 8, 10, 11, 12, 13, 14, 15, 16, 23

*Quindlen v. Hirschi*,
284 P.2d 723 (Okla. 1955) . . . . . 19

*Randall v. Brigham*,
7 Wall. (74 U.S.) 523 (1868) . . . . . 8, 12, 13

*Spires v. Botteroff*,
317 F.2d 273 (7th Cir. 1963) . . . . . 17

*Stewart v. Cooley*,
23 Minn. 347 (1877) . . . . . 22

*Yaselli v. Goff*,
12 F.2d 396 (2nd Cir. 1926),
affirmed mem. 275 U.S. 503 (1927) . . . . . 13



Page

*Yates v. Hoffman Estates*,
209 F. Supp. 757 (D.C. Ill. 1962) . . . . . 18

**Federal Statutes:**

42 U.S.C. § 1983 . . . . . 6, 7
42 U.S.C. § 1985(3) . . . . . 6, 7

**Miscellaneous:**

Black's Law Dictionary, (4th Ed. 1951) . . . . . 15

Cooley on Torts (3d Ed. 1906) . . . . . 16

*Developments in the Law, Remedies Against the United States and Its Officials*,
70 Harv. L. Rev. 827 (1957) . . . . . 24

Jennings, *Tort Liability of Administrative Officers*,
21 Minn. L. Rev. 263 (1937) . . . . . 22

Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 Vand. L. Rev. 941 (1977) . . . . . 23

Note, *Liability of Judicial Officers Under Section 1983*,
79 Yale L.S. 322 (1969) . . . . . 24

Oster, *Sterilized daughter seeks justice*,
Chi. Sun-Times, Oct. 30, 1977. . . . . 7

In the

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

*Petitioners,*

*vs.*

LINDA KAY SPARKMAN and LEO SPARKMAN,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENTS

Respondents agree with Petitioners' Brief with respect to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved. In Respondents' view, however, Petitioners have seriously misdescribed the Question Presented by this case, and they have failed to include significant facts in their Statement of the Case.

In Respondents' view the real question presented and the correct Statement of the Case are as follows:

## QUESTION PRESENTED

Whether the act of a state court judge in secretly approving a petition for permanent sterilization of a 15-year-old girl constitutes a judicial act within the meaning of the judicial immunity doctrine where the approval concededly was given by the judge in the clear absence of:

[1] A judicial proceeding pending or contemplated;
[2] The filing of papers in the judge's court before or after the approval;
[3] The appointment of a guardian *ad litem* to represent the interests of the minor child;
[4] Notice to the minor child or a guardian *ad litem* on her behalf;
[5] A hearing to determine the adequacy of the petition for sterilization;
[6] The preservation of the right of appeal to correct any due process error or to prevent the operation of permanent sterilization from being performed.

## STATEMENT OF THE CASE

On July 9, 1971, Ora McFarlin sought court approval to have her 15-year-old daughter, Linda Spitler (now Sparkman) permanently sterilized. Warren G. Sunday, an attorney, had prepared a "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement," which contained an affidavit by Ora McFarlin that Linda was "somewhat retarded" even though she attended public schools and had been "passed along with other children in her age level." The mother also asserted that Linda had left home on "several occasions" and had "stayed overnight" with "older youth or young men." Claiming that she could not



"maintain and control a continuous observation of the activities of said daughter each and every day," the mother requested permanent sterilization in order to "prevent unfortunate circumstances." App. A25.

The petition was presented to and signed by Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana. Both the presentation and approval took place on July 9, 1971, the same day that it was signed by Ora McFarlin. Judge Stump's approval of the petition was done in an ex parte manner in an undisclosed location; no claim has ever been made, however, that the signing took place in the courthouse, the courtroom or the judge's chambers. There was no appointment of a guardian *ad litem* to represent Linda's interests. The petition was not filed with the DeKalb Circuit Court. No notice was given to Linda or anyone on her behalf of the petition, which was approved without any hearing. No court record of the secret approval was made, and there was no opportunity, therefore, for Linda or anyone on her behalf to appeal the decision to have her permanently sterilized before the act took place, seven days later on July 16, 1971. App. A11-A13.

For the convenience of this Court, a copy of the "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement" is reproduced here in its actual form but reduced from the original legal size pages. As part of the record of this case, it is also found in the printed Appendix at pages A25, A26.

STATE OF INDIANA)
COUNTY OF DEKALB) SS:

PETITION TO HAVE TUBAL LIGATION PERFORMED ON MINOR
AND INDEMNITY AGREEMENT

Ora Spitler McFarlin, being duly sworn upon her oath states that she is the [redacted] mother of and has custody of her daughter, Linda Spitler, age fifteen (15) being born January 24, 1956 and said daughter resides with her at 108 Iwo Street, Auburn, DeKalb County, Indiana.

Affiant states that her daughter's mentality is such that she is considered to be somewhat retarded although she is attending or has attended the public schools in DeKalb Central School System and has been passed along with other children in her age level even though she does not have what is considered normal mental capabilities and intelligence. Further, that said affiant has had problems in the home of said child as a result of said daughter leaving the home on several occasions to associate with older youth or young men and as a matter of fact having stayed overnight with said youth or men and about which incidents said affiant did not become aware of until after such incidents occurred. As a result of this behavior and the mental capabilities of said daughter, affiant believes that it is to the best interest of said child that a Tubal Ligation be performed on said minor daughter to prevent unfortunate circumstances to occur and since it is impossible for the affiant as mother of said minor child to maintain and control a continuous observation of the activities of said daughter each and every day.

Said affiant does hereby in consideration of the Court of the DeKalb Circuit Court approving the Tubal Ligation being performed

WARREN G. SUNDAY
ATTORNEY
INSURANCE BUILDING
AUBURN, INDIANA 46706



upon her minor daughter does hereby covenant and agree to indemnify and keep indemnified and hold Dr. John Hines, Auburn, Indiana, who said affiant is requesting perform said operation and the DeKalb Memorial Hospital, Auburn, Indiana, whereat said operation will be performed, harmless from and against all or any matters or causes of action that could or might arise as a result of the performing of said Tubal Ligation.

IN WITNESS WHEREOF, said affiant, Ora Spitler McFarlin, has hereunto subscribed her name this 9th day of July, 1971.

Ora Spitler McFarlin, Petitioner

Subscribed and sworn to before me this 9th day of July, 1971.

Warren G. Sunday, Notary Public

My commission expires January 4, 1975

---

I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

Harold D. Stump
Judge, DeKalb Circuit Court

Dated: July 9, 1971

WARREN G. SUNDAY
ATTORNEY
INSURANCE BUILDING
AUBURN, INDIANA 46706

On July 16, 1971, a tubal ligation was performed by John H. Hines, M.D., at the DeKalb Memorial Hospital in Auburn, Indiana, resulting in the permanent sterilization of Linda. Linda had been told that the purpose of her hospitalization was to have her appendix removed and she was unaware of the fact that a tubal ligation was performed on her. App. A11.

When on August 18, 1973, Linda married Leo Sparkman, she was still unaware of the fact that she had been permanently sterilized. A few months thereafter Linda was told by her mother that her tubes had been tied, but that they would come untied on their own accord. Linda told Leo that her tubes might have been tied at the time her appendix was removed. Around February, 1974, they went to see Dr. Hines, who falsely told them that Linda had not been sterilized. It was not until May, 1975, that Linda and Leo were for the first time informed that a tubal ligation had been performed on Linda on July 16, 1971, permanently sterilizing her. App. A12.

Linda and Leo Sparkman brought an action seeking damages under Title 42 U.S.C. §§1983 and 1985(3), contending that the actions of the Defendants in sterilizing Linda or causing her to be sterilized violated her Constitutional rights. Linda Sparkman attached pendent state claims for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The United States District Court for the Northern District of Indiana, Fort Wayne Division, granted Defendants' motion to dismiss the federal claims, holding that the actions of Judge Stump presented the only state action necessary to provide federal court jurisdiction; and that since the actions of Judge Stump were clothed with absolute judicial immunity, neither he nor his alleged co-conspirators were liable under Title 42 U.S.C. §§1983 and 1985(3). Plaintiffs' remaining claims were dismissed as they were pendent to the federal causes of action.



An appeal was taken and on March 23, 1977, the Seventh Circuit Court of Appeals, with Judge Luther M. Swygert speaking for a unanimous Court, reversed the decision of the District Court and ordered the case remanded for further consistent proceedings.

In their Statement of the Case (Brief p. 7), Petitioners state that Linda was "unable to progress further than a third-grade scholastic level at school" and was "unable to respond effectively to efforts at vocational training." These statements have never heretofore appeared in the record of this case, and they are given without appendix or record citation by Petitioners. Additionally, they conflict directly with the petition which was presented to Judge Stump for his approval. In the petition it was stated that Linda was proceeding normally through school. Actually, at age 15 she was well beyond the third grade.

Also, in their Statement of the Case (Brief p. 7), Petitioners for the first time maintain that the tubal ligation performed on Linda was "reversible."[1] Nothing in the record warrants that assertion.

---

[1] Although the record of this case contains no evidence regarding the possibility of reversal of the tubal ligation (because the issue has never arisen and reversibility has never been suggested by Petitioners) medical experts generally agree that reversibility depends upon the procedure used in the performance of the tubal ligation—and it is always a long-shot gamble. Dr. John Hines performed the tubal ligation and he has publicly stated that it is questionable that any reversal would be possible in Linda's case. Oster, *Sterilized daughter seeks justice,* Chi. Sun-Times, Oct. 30, 1977, p.8, col. 3.

## SUMMARY OF ARGUMENT

The common law doctrine of judicial immunity established by this Court in *Randall v. Brigham*, 7 Wall. (74 U.S.) 523 (1868), *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872), and *Pierson v. Ray*, 386 U.S. 547 (1967), provides immunity to a judge for judicial acts not taken in the clear absence of jurisdiction. The predicate of this doctrine assumes that a judge is performing a *judicial act*. If the predicate is not met, the acts of a judge are not entitled to immunity. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).

The rationale for the doctrine of judicial immunity applies only where judicial acts are performed. Although it is a judge's "duty to decide all cases within his jurisdiction that are brought before him" (*Pierson* at 554), the rationale justifying immunity for an erroneous decision is drawn from the initial requirement that there be a "case" and that therefore an error in the case "may be corrected on appeal."

Likewise, this Court in *Pierson* (at 554) realized that a judge must be free from "fear that unsatisfied litigants may hound him with litigation charging malice or corruption." This rationale is clearly based upon the requirement that the dissatisfaction is that of a "litigant" and not a non-party to a non-judicial proceeding.

Finally, in *Pierson* (at 554), this Court reasoned that a failure to grant immunity for a judicial act within a court's jurisdiction would "contribute not to principled and fearless decision-making but to intimidation." Once again, the "fearless decision-making" manner in which a judge must be free to act clearly contemplates only decision-making within the context of a judicial proceeding. No other logical analysis could exist.



Imposition of liability for non-judicial acts provides the only available remedy for the permanent deprivation of personal rights. Therefore, the threshold question presented in this case is whether the act of Judge Stump in secretly approving the permanent sterilization of Linda Sparkman was a judicial act within the contemplation of the doctrine of immunity. If not, he is not entitled to immunity, and it then becomes unnecessary to determine if his act was performed in clear absence of any jurisdiction.

Petitioners' brief (p. 28) agrees that judicial immunity does not attach "where the judge's act was not a judicial function." Indeed, their brief even concedes that when Judge Stump signed the approval of the sterilization, he did so in the total absence of each element necessary to constitute a judicial act. According to their brief (p. 31), Judge Stump's act of approval was a judicial nullity undertaken in such a manner as to fail "to implement fundamental procedures of notice, appointment of guardian *ad litem* and [the] holding [of] a formal hearing." Petitioners have correctly perceived that the total absence of notice, the total failure to appoint a guardian *ad litem* for Linda, and the total failure to provide for a hearing constitute something other than the procedure followed when a court makes a judicial order. An act undertaken in such a setting obviously is not a judicial act, but rather is an informal approval made outside of any judicial proceeding. As Petitioners' brief concludes (p. 31), the act of Judge Stump in approving Linda's sterilization "could not have been the basis of an appeal." Likewise, it could not have been a judicial act.

Although Petitioners maintain in their brief that Judge Stump's approval of the sterilization of Linda Sparkman was a judicial act (p. 30), they describe in detail why in reality the act was not a judicial act and was therefore a

judicial nullity. Petitioners do not explain why the approval was a "judicial act," other than to imply that the judge of a court of general jurisdiction, even without sitting on the bench or contemplating a case brought before him, is by virtue of his office performing a judicial act in everything he does.

However, the doctrine of judicial immunity does *not* apply to every act of an individual holding the title of "judge," *Gregory v. Thompson, supra*; *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), even where the actions of the judge might take place in the courtroom or chambers. *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958); *Ex parte Virginia*, 100 U.S. 339, 348 (1879).

Although the doctrine of immunity serves to protect our judiciary, it is also intended to protect the public. *Pierson v. Ray*, 386 U.S. at 554. If Judge Stump were to be granted immunity in this case, the result would be that the judiciary would now have immunity for even non-judicial acts; and it would further mean that the interests of the public in a judiciary free from intimidation would be gravely overshadowed by the reasonable public fear of unbridled power exerted in a non-judicial setting and manner.

## ARGUMENT

### I

### A JUDGE IS IMMUNE FROM CIVIL LIABILITY ONLY AS TO THOSE JUDICIAL ACTS PERFORMED IN EXERCISE OF HIS JURISDICTION.

The decision in this case must turn upon the common law doctrine of judicial immunity. Was Judge Stump performing a judicial act within the scope of his jurisdiction when he signed the typewritten paper thrust before him,



thereby approving the permanent sterilization of Linda Sparkman?

As summarized by this Court in *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967), "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872)." And the *Bradley* decision did indeed make clear, 13 Wall. at 351-352, that

> . . . judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

An even earlier decision by this Court, *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 536 (1868), also made plain the nature of the immunity doctrine, stating that judges of superior or general authority "are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction."

But the absolute immunity enjoyed by the judiciary does not depend, as Petitioners would have it, solely upon an examination and determination of the question whether a judge was acting in "excess of jurisdiction" or in "the clear absence of all jurisdiction over the subject matter." Underlying the whole question of whether the judge was acting within or without the area of jurisdiction is the predicate problem whether the questioned act of the judge was in fact a judicial act. When this Court has spoken of immunity for acts within the jurisdiction of a judge, it has declared that the doctrine insulates judges from civil liability only "for acts committed within their *judicial* jurisdiction," or "for acts within [their] *judicial* role," *Pierson v. Ray*, 386 U.S. at 554 (emphasis added). In the seminal decision in *Bradley v. Fisher*, 13 Wall. at 351, 354, the Court repeatedly referred to an exemption of judges from civil liability "for their *judicial acts*" within the arguable scope of their jurisdiction. And *see Imbler v. Pachtman*, 424 U.S. 409, 418, 423, n. 20 (1976).

In other words, the first inquiry must be whether the questioned act of the judge can be fairly described as a judicial act or a non-judicial act. Only if the judge appears to have been acting as a judge–rather than as an individual–does it become critical to determine whether his judicial act was performed in "the clear absence of jurisdiction over the subject matter." Obviously, questions as to jurisdiction over the subject matter cannot arise if



the perpetrator of the act in question is a layman, or a judge acting in a non-judicial capacity.

In all of the three judicial immunity cases that have been before this Court–*Randall*, *Bradley* and *Pierson*[2]–the Judges below were unquestionably acting in their judicial roles when their actions were taken. In *Randall* and *Bradley*, the Judges were performing the judicial task of disciplining lawyers who had participated in proceedings before the respective courts; and in *Pierson*, the Judge had engaged in the purely judicial task of trying certain defendants who had been duly charged with certain misdemeanors. And in each of those cases this Court had no difficulty in finding that the Judges were immune to civil liability, their judicial acts not having been performed "in the clear absence of jurisdiction over the subject matter." But the presently relevant point is that in none of those cases did this Court have occasion to examine or refine the acknowledged and essential predicate to the judicial immunity doctrine, *i.e.*, the commission of acts of a judicial nature. The opinions in those cases merely noted the necessity of judicial acts having been performed, and then concentrated on the ultimate factor in the judicial immunity equation–whether the judicial acts were committed merely in excess of jurisdiction or whether they reflected a complete absence of jurisdiction.

At the same time, the *Randall-Bradley-Pierson* trilogy indicates that virtually all of the justification and purpose

---

[2]*See also Yaselli v. Goff*, 275 U.S. 503 (1927), where this Court affirmed per curiam, "on the authority of *Bradley v. Fisher*, 13 Wall. 335, 337; *Alzua v. Johnson*, 231 U.S. 106, 111," a Second Circuit decision (12 F.2d 396 (C.C.A. 2, 1926)), that had held a justice of the peace and certain federal officers immune from suit.

of the judicial immunity doctrine lies in the need to protect judges in the execution of their judicial actions. In *Pierson*, 386 U.S. at 554, for example, the Court offered three separable reasons for imposing absolute immunity on the judiciary, each reason stemming from the desirability of immunizing judicial acts as distinguished from non-judicial acts:

[1] It was said in *Pierson* that, it being the judge's "duty to decide all cases within his jurisdiction that are brought before him," any "errors may be corrected on appeal." Thus a party need not sue the judicial officer to vindicate rights that can more simply be vindicated wtihin the appellate judicial structure. But that rationale for judicial immunity necessarily assumes that the judge has acted in a judicial manner in "cases within his jurisdiction that are brought before him," so that his errors may be corrected on appeal. If he has not acted in a judicial context, however, he has done nothing that the judicial system can correct. Hence, this immunity rationale is directed solely at the performance of judicial acts, correctable if need be by an appeal in cases "brought before him."

[2] The *Pierson* opinion also indicated that, since the judge's judicial acts are correctable on appeal, "he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Here again, the threat of suits against judges instituted by "unsatisfied litigants" assumes that the litigants have been dissatisfied by the judges' *judicial* actions taken in judicial proceedings brought before them. Such a threat obviously cannot ensue from any non-judicial personal action taken by a judge; an unsatisfied litigant by definition is a litigant who is dissatisfied by a judge's ruling in the context of some judicial-type adversary proceeding.[3]



[3] *Pierson* also said that imposing civil liability on judges "would contribute not to principled and fearless decision-making but to intimidation." Decision-making, of course, is of the very essence of judicial action. But decision-making in the context of non-judicial action, be it principled or fearless, is simply not the kind of decision-making that the judicial immunity doctrine is meant to preserve.

In sum, then, the immunity doctrine is directed only at the untrammeled exercise of judicial power. As the Court reiterated in *Pierson*, 386 U.S. at 554, the doctrine is for the benefit not of the corrupt judge but of the public, "whose interests it is that the judges should be at liberty to exercise their [judicial] functions with independence, and without fear of consequences." Thus to have absolute immunity and to justify the public interest in that immunity, as noted in Mr. Justice Douglas' dissent in *Pierson*, 386 U.S. at 567, n. 6, "the judge must be performing a judicial function." *See also Ex parte Virginia*, 100 U.S. 339, 348 (1879).

It follows that where a judge acts completely outside the arena of a judicial proceeding, he is not performing a judicial function and hence is entitled to no immunity from civil liability for his tortious extra-judicial acts. And

---

[3] *Black's Law Dictionary*, 4th Ed., p. 1082, defines "litigant" as "A party to a lawsuit; one engaged in litigation; usually spoken of active parties, not of nominal ones."

in determining whether he is within or without that arena, it is not decisive whether he was holding office or was in the courtroom or in his chambers at the time of the action in question. *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958).[4]

What constitutes conduct falling outside the judicial arena must, in large part, be determined by examining the challenged conduct in light of the purposes and values underlying the immunity doctrine. *Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974). Is the conduct of the kind that deserves protection in order to promote the public interest in the effective and free functioning of the judicial system? See *Barr v. Matteo*, 360 U.S. 564, 572-573 (1959). Is the judge's act an inherent part of the judicial function in disposing of any and all "cases within his jurisdiction that are brought before him"? See *Pierson v. Ray*, *supra*, 554. Is the act such as to be amenable to possible correction on appeal to a higher court? *Ibid.* Is immunization of the challenged act necessary to preserve the judge's duty to engage in "principled and fearless decision-making" and to free him from fear of "intimidation" in the exercise of that judicial function? *Ibid.* Given such considerations, the Court that resolves the judicial or non-judicial nature of the judge's act must make "a discerning inquiry into whether the contributions of immunity to effective government [or to an effective judicial system] in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

---

[4]"A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess." Cooley on Torts 805-806 (3d ed. 1906).



It is precisely because the foregoing questions must all be answered in the negative, thus weighing the balance totally against immunity, that lower courts have consistently held that judges are liable for the harm caused by their physical and other acts disassociated from their judicial duties. Thus in *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974), the Ninth Circuit held an Arizona Justice of the Peace liable in a §1983 action for having bodily assaulted and ejected from the courtroom a non-lawyer who had sought to represent a friend who had earlier been fined for a minor traffic offense. As the court stated, 500 F.2d at 64:

> The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached. A judicial act within the meaning of the doctrine may normally be corrected on appeal. *See Pierson v. Ray*, 386 U.S. at 554. But when a judge exercises physical force in a courtroom, his decision is not amenable to appellate correction. More importantly, we cannot believe that the purpose of the judicial immunity doctrine—to promote "principled and fearless decision-making"—will suffer in the slightest if it is held that judges who physically assault persons in their courtrooms have no automatic immunity.

*See also Spires v. Botteroff*, 317 F.2d 273 (7th Cir. 1963), cert. denied, 379 U.S. 938 (1964) (liability imposed on a judge who, after disqualifying himself from a case,

interfered with the proceedings and filed a false affidavit therein); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) (state judge may not be immune for acts done as chairman of an administrative body when he was not in the performance of any judicial duties); *Yates v. Hoffman Estates*, 209 F.Supp. 757 (D.C.Ill. 1962) (judge held liable under §1983 for having performed the "non-judicial action" of directing a police officer to arrest and take into custody a person not named in a warrant); *Penn v. Eubanks*, 360 F.Supp. 699 (M.D.Ala. 1973) (judge of a state jury board subject to liability for administrative acts taken in that capacity); *Ex parte Virginia*, 100 U.S. 339 (1879) (selection of jurors not a judicial act which could grant immunity).

In light of all the foregoing considerations, the point has now been reached where Judge Stump's action in approving the sterilization of Linda Kay Sparkman must be tested as being either a judicial or a non-judicial action.

## II

## IN THE TOTAL ABSENCE OF ANY JUDICIAL PROCEEDING HAVING BEEN INVOKED OR EVEN CONTEMPLATED, JUDGE STUMP'S SECRET APPROVAL OF THE PERMANENT STERILIZATION MUST BE DEEMED A NON-JUDICIAL ACT AS TO WHICH NO JUDICIAL IMMUNITY ATTACHES.

From every standpoint, starting with either the public interest or the judicial values implicit in the judicial immunity concept, Judge Stump's secret signing of the sterilization approval in 1971 bears none of the markings of a judicial act. Indeed, it is at once an act so unfair, so destructive of due process, so totally devoid of judicial concern for the interests and well-being of the young girl involved as to lack all pretense of qualifying as a judicial



act. Such a severe conclusion is compelled by the following considerations pertinent to the judicial immunity concepts:

[1] The petition and approval portion signed by the judge, which apparently were drafted by the attorney for Linda's mother, neither constituted nor related to the institution of any kind of judicial proceeding. The petition had no case caption naming parties or naming any court. No number was ever assigned to the matter. Indeed, no attempt was made to file or deposit these documents, or any other piece of paper, in the Clerk's Office of the Court on which Judge Stump sat. Not even Judge Stump was left with a copy of what he had signed. To this day, no proceeding of any kind, to which this sterilization approval might somehow be related, has ever been instituted before Judge Stump or the Court on which he still sits.[5]

[2] The petition was presented in some secretive manner to Judge Stump, and he signed the sterilization approval in some equally secretive manner still not revealed. No attempt was made by Judge Stump to appoint a guardian *ad litem* to protect and represent the interests of a juvenile whose mother had asserted a cruelly adverse position. Nor was any step taken by Judge Stump to ensure that Linda would be notified of the impending sterilization in time to protest so permanent a loss of her ability to procreate. Thus were lacking the two most elemental of the

---

[5]The fact that no judicial proceeding of any kind was ever instituted before Judge Stump serves to distinguish this case from *Quindlen v. Hirschi*, 284 P.2d 723 (Okla. 1955), much relied upon in Petitioners' Brief, p. 22. In *Quindlen* an "insanity case" had been instituted in the state court; the only defect was the failure to notify the minor girl or to appoint a guardian *ad litem*.

procedural due process requirements—a notice and an opportunity to protest before any final action is taken.

[3] Neither the petition nor the approval even pretended to cite any Indiana statute or rule of law which authorizes such summary and ex parte procedure. Whatever jurisdiction may reside in Judge Stump or his Court to deal with juveniles in general or with sterilization in particular, not one of the Indiana statutes cited in Judge Stump's brief in this Court (pp. 4–6) contemplates or authorizes secret, ex parte proceedings where the interests of the parent and child are so widely disparate. Those statutes, moreover, do not indicate that any kind of a sterilization proceeding can be invoked, or a sterilization ordered by a court, on a mother's untutored and unproved assertions that her daughter is "somewhat retarded" and has been staying "overnight with said youth or men." App. A25.

[4] The total and intended failure to notify Linda of the petition and approval necessarily made it impossible for Linda, or any guardian or representative, to seek any sort of appellate review or correction of Judge Stump's approval of the sterilization. Since no order was ever entered on the docket sheet or records of Judge Stump's court, it seems doubtful that any appeal from such a nonexistent order could ever have been taken, even if Linda had been notified in time. Possibly some sort of extraordinary relief by way of prohibition or mandamus might have served to correct such gross due process violations; but the utter secrecy that surrounded the sterilization approval and the speed with which the approval was executed (seven days) rendered such a remedy illusory and useless.

Thus was taken from Linda what this Court described in *Bradley v. Fisher*, 13 Wall. at 354, as that most basic



"rule of natural justice"—whereby no court should ever exercise any of its powers "without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense."

[5] The above factors were all exacerbated, of course, by the permanency of the damage done to Linda's body. For all medical intents and purposes, nothing can now be done to reverse the lasting effect of the tubal ligation. And since the legal capacities to stop the operation or to preserve the status quo ceased—both theoretically and practically—the moment the hasty operation was performed, the judicial system can only stand aside and mourn one of its less finer hours.

All of these factors combine to demonstrate that Judge Stump's action on July 9, 1971, in approving the so-called tubal ligation petition was not a judicial act taken in the course of a judicial proceeding filed or to be filed in the DeKalb Circuit Court. It was an act as utterly non-judicial as would have been the act of Judge Stump in approving a petition to demolish a structure, a petition presented to him on a Friday evening in a drugstore or on the street corner in Auburn, Indiana, without any attempt ever having been made to institute any kind of real property proceeding in his Court. It is simply not part of the recognized judicial function secretly to sign ex parte orders that have no relation to any kind of a judicial proceeding pending in the court. Thus in *Joyce v. Hickey*, 337 Mass. 118, 147 N.E.2d 187, 190 (1958), a probate judge was held liable in an action for false arrest and imprisonment where the judge's contempt action occurred when there allegedly "was no session of court and no formal proceeding pending before [the judge] . . . [and when he] was not engaged in any permissible judicial inquiry with respect to any pro-

bate matter, or the conduct of fiduciaries or attorneys, or other subject as to which [he] could properly act as a judge."[6]

Indeed, Judge Stump's brief (p. 28) in this Court properly concedes that judicial immunity does not attach "where the judge's act was not a judicial function." And that brief also concedes (p. 31), though rather perversely, that Judge Stump's act of approving the tubal ligation petition "required nothing of anybody and carried with it no power of sanction should it have been ignored . . . [and] required no giving of notice and could not have been the basis of an appeal." The brief adds (p. 31) that "great weight and considerable compassion" may be attached to Judge Stump's act precisely because it was such a judicial nullity, combined with an acknowledged failure on the judge's part "to implement fundamental procedures of notice, appointment of guardian *ad litem* and holding a formal hearing." In short, Judge Stump in effect has proudly proclaimed to this Court that his action on July 9, 1971, "was not a judicial function." Any action of a judge that requires nothing of anybody, carries with it no power of sanction if ignored, requires no giving of notice, and cannot be made the basis of an appeal (all done outside the context of any judicial proceeding and without any jurisdiction having been invoked) is a perfect and classic example of a

[6]*See also Stewart v. Cooley*, 23 Minn. 347, 350 (1877), allowing a conspiracy action to lie against a judge where the conspiracy allegedly began before the commencement of any judicial proceeding, the judge's conduct not having been "in the course of any judicial proceeding or in the discharge of any judicial function." *See also* Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 273 (1937).



non-judicial act. Obviously, immunity was not designed to attach to that extra-judicial kind of action.[7]

Judge Stump's characterizations of his own action are well taken, for they demonstrate not only the non-judicial nature of that action but also the reasons why the judicial immunity doctrine is totally inapplicable. To pit Judge Stump's characterizations against the immunity rationalizations as summarized in *Pierson*, 386 U.S. at 554, produces the following conclusions:

[1] The immunity doctrine is not here appropriate since there is no way, according to Judge Stump, in which any errors in his July 9, 1971, action could have been corrected on appeal. That action, he says (Brief, p. 31), was not an "order" that could have been "the basis of an appeal." How, then, can any errors be corrected if immunity is imposed? *See Pierson*, 386 U.S. at 554.

[2] If, as Judge Stump says, the action of July 9, 1971, "required nothing of anybody," and carried with it no sanction or basis of an appeal, how can Judge Stump "fear that unsatisfied litigants may hound him with litigation charging malice and corruption" (*Pierson*, 386 U.S. at 554) if he is subjected to liability in this instance? How can there be any "litigants" to fear if there has never been an adversary judicial proceeding between "litigants"?

[3] How can it be said that lifting immunity from Judge Stump's action of July 9, 1971, "would contribute not to principled and fearless decision-making but to intimidation" (*Pierson*, 386 U.S. at 554)? Can so gross a violation of

[7]For a discussion of the instant case, *see* Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 Vand. L. Rev. 941, 960-963 (1977).

due process guarantees, in the form of a non-appealable non-order, be fairly described as a "principled and fearless decision-making" event? Why should the immunity doctrine be applied merely to perpetuate the judicial freedom to impose such odious non-orders on what a judge conceives to be the "best interests" (Brief, p. 31) of some unsuspecting child or adult? On the contrary, if by subjecting Judge Stump to liability in this instance will intimidate and frighten him and other judges of general jurisdiction from committing such blatant and uncorrectible non-judicial violations of due process, the public interest will have been well served.[8]

Judge Stump's characterizations of his own action on July 9, 1971, hardly comport with his suggestion (Brief, p. 31) that judges, "by their judicial pronouncements, perpetrate an aura of deism which surrounds the bench." Judge Stump's action was simply not a "judicial pronouncement." At best, in the words of the Seventh Circuit (Pet. App. A14), it was

> ... an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's

[8]See Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322 (1969). See also *Developments in the Law, Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 833 (1957).



> allegations or to have a higher court examine whether the substance of those allegations, even if true, warranted her sterilization. Finally, the petition and order were never filed in court. This kind of purported justice does not fall within the categories of cases at law or in equity.

In a word, Judge Stump's action was that of a layman, not a judge acting within the four corners of a judicial proceeding in which some kind of jurisdiction has been invoked. The doctrine of absolute judicial immunity was never intended to protect judges from liability when they act so far outside "the aura of deism which surrounds the bench."

## CONCLUSION

For these various reasons, the judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

RICHARD H. FINLEY
124 East Rush Street
Kendallville. Indiana 46755
(219) 347-0600

EUGENE GRESSMAN
Suite 701
1828 L Street, N.W.
Washington, D.C. 20036
(202 466-8400

*Counsel for Respondents*

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 76-1750**

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*vs.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR THE PETITIONERS.

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
219-423-9551,
*Counsel for Petitioners.*

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977.

---

**No. 76-1750**

---

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., AND WARREN G. SUNDAY,
*Petitioners,*

*vs.*

LINDA KAY SPARKMAN AND LEO SPARKMAN,
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

## REPLY BRIEF FOR THE PETITIONERS.

---

### I.

### THE INFERENCE OF SECRETIVENESS IS UNSUPPORTED. RESPONDENTS CONCEDE ALL BUT "JUDICIAL ACT".

In the Statement of the Case in Respondents' Brief, it is asserted for the first time that the petition in question was not submitted to Judge Stump in the courthouse, the courtroom or the judge's chambers. Such inferential statements are totally unsupported. That the petition does not carry a file mark is undisputed. Respondents, in their brief, produce no authority stating that a court of general jurisdiction requires such for-

mality before it may act pursuant to the jurisdiction conferred upon it. Formality is customarily entirely dispensed with as in the case of underaged persons intending to marry. They may petition, "either orally or by written petition the judge of the circuit court". I. C. § 31-1-1-4.

The entire thrust of Respondents' Brief is focused upon the presumptive conclusion that the approval of Judge Stump appended to the petition submitted by the mother of Linda Kay Sparkman was not signed by him as a judge and was not a judicial act.

In addition, the proceedings are now characterized as having been presented "in some secretive manner to Judge Stump, and he signed the sterilization approval in some equally secretive manner still not revealed." (Respondents' Brief, p. 19)

These unsupported presumptions culminate in the conclusion by Respondents that the act of approval was a "classic example of a non-judicial act." (Respondents' Brief, pp. 22 and 23)

Respondents, by their failure to meet and answer the arguments set forth in Brief for the Petitioners, must be deemed to have conceded the accuracy and validity of the following:

1. The General Jurisdiction Statute, I. C. § 33-4-4-3, in effect in the year 1971, gave Judge Harold D. Stump jurisdiction of all causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

2. Indiana Code § 16-8-3-1 & 2, in effect in 1971, provided for medical or surgical treatment of an incompetent and that consent for such treatment may be given by the parent having custody of such minor.

3. Neither of said statutes had been given any narrow construction by any Indiana court until 1975, four years later, when it was determined that I. C. § 16-8-3-1 & 2 do not permit sterilization.



4. I. C. § 16-8-3-1- & 2 do not provide, by their terms, for any formal context in which the consent of the parent is to be given.

5. Unless an act is done in the clear absence of all jurisdiction and this fact is known to the judge, acts of judges performed in the course of their official functions are immune from civil liability.

6. Whenever a court's general jurisdiction over the subject-matter is invoked, the court has the right to determine if it has the power to determine if it has jurisdiction to proceed to dispose of the matter.

7. Judicial immunity is not lost through procedural errors, irregularities or deficiencies of a circuit court judge's acts.

8. So long as subject-matter jurisdiction of a court is invoked, subsequent procedural irregularities will not destroy the court's immunity.

9. The terms "jurisdiction" and "judicial function" are given broad definition.

## II.

## THE MOTHER'S VERIFIED PETITION CONFERRED JURISDICTION OVER HER DAUGHTER.

Failure to give notice and to appoint a guardian ad litem on behalf of Linda Kay Sparkman are erroneously characterized in Respondents' Brief as being "devoid of judicial concern for the interests and well-being of the young girl".

The court's jurisdiction over the young girl was invoked by the mother's verified petition. If notice was to be given to the young girl, the notice was presumed to have been supplied to her through the mother, her natural guardian.

Respondents are apparently horrified by the fact that the interests of a child were dealt with by a court without causing a guardian to be appointed for said child and presumably an attorney to represent her. Such dispositions are, however, com-

monplace and Respondents must understand that. In every divorce action in which there are minor children, disposition of their interests is made in the award of custody, amounts of support, directions for educational and religious training, specific medical treatment and visitation rights. All this is traditionally and customarily done without notice to the minor, without the appointment of a guardian ad litem and, of course, without the appointment of an attorney to represent the minor. Respondents cannot seriously suggest that a court of general jurisdiction does not possess, by the fact of such jurisdiction, power to dispose of the interests of minor children under such circumstances by virtue of the petition and testimony of the natural parent and guardian of said children, absent notice or specific representation on behalf of the children.

Such is obviously the case with which Judge Stump was confronted upon the verified petition of Ora McFarlin. If Ora McFarlin failed to notify her daughter of the contents of the petition or if Dr. John Hines or other medical defendants failed to advise Linda Sparkman, and if such failure is found to be culpable, Linda Sparkman has preserved her remedy against such persons for such failure with her residual right to proceed against them in state court.

## III.

## RESPONDENTS CONCEDE THE APPROVAL WAS NOT AN ORDER.

Respondents do not contest the fact that Judge Stump had subject-matter jurisdiction over the contents of the petition. Respondents admit that Judge Stump had jurisdiction to determine if he had jurisdiction over Linda Sparkman. Respondents do not refute the conclusion of District Court Judge Eschbach, to wit: By submitting her petition, "Mrs. McFarlin consented to the performance of the operation . . ." (Memorandum of Decision and Order, App. to Petition for Writ of Certiorari, p. A3.) It has already been shown that the Judge acquired



jurisdiction to deal with Linda Kay Sparkman by virtue of the verified statements contained in the petition filed by her mother.

Both Respondents and the Court of Appeals have previously improperly attempted to characterize Judge Stump's approval of the petition as an "order". Having failed in that attempt, Respondents now, in a complete reversal of position, attempt to characterize the approval as a non-judicial act and, therefore, a nullity. If that be true, Judge Stump should not be a party defendant in this litigation and the Memorandum and Decision of the Federal District Court dismissing the action be upheld, for the reason that no state action was involved and, therefore, no action may be maintained by Respondents under 42 U. S. C. A. § 33 1983-1985.

"Nullity" is defined as "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect." *Black's Law Dictionary*, Revised 4th Ed., p. 1216. Again, if Respondents' position is to be given credence, no judicial doctrine need be applied to anything done by Judge Stump since he does not belong in this litigation as a party.

## IV.

## AT ALL TIMES, JUDGE STUMP ACTED IN HIS JUDICIAL CAPACITY.

Although the position adopted by Respondents presents Judge Stump with an easily accessible exit from this litigation, there remains the more logical assessment of his action.

It has been shown that his approval of the petition cannot be construed to be an order. However, to take the position that the Judge executed the approval in a role other than as Judge of the DeKalb Circuit Court requires an abandonment of common sense or an assumption that Ora McFarlin and her attorney, Warren G. Sunday, purposely engaged in a totally useless act in preparing and presenting the Verified Petition. Placing such a construction upon the facts strains credulity.

Unquestionably, the Verified Petition of Ora McFarlin was presented to Harold D. Stump in his capacity as the duly elected and acting Judge of the Circuit Court of DeKalb County and it was in that capacity that he signed the approval. The effect of that approval may be of very slight significance, but the act of approval was unquestionably a judicial act. For the reasons set forth in Petitioners' Brief and undisputed by Respondents, said act of approval is entitled to be clothed with judicial immunity.

## V.

### BRIEF AMICUS: AMERICAN CIVIL LIBERTIES UNION, ET AL.

Should the Court grant the motions of the American Civil Liberties Union, et al. to file its Amicus Brief, the following is a reply to the pertinent portions of the Brief.

Said Petitioners' assertion (p. 9):

> "Apparently, Petitioners' argument is that once a judge demonstrates that he had subject-matter jurisdiction, he is protected by judicial immunity, even if he acted without any semblance of personal jurisdiction."

Such misstatements are characteristics of this particular Brief as will be herein pointed out. Subject-matter jurisdiction is concededly and unquestionably vested in Judge Harold D. Stump. The Verified Petition itself, presented by the mother of Linda Kay Sparkman and on her behalf vested the court with sufficient jurisdiction to issue the approval. Reference is made to *Randall* v. *Brigham*, 74 U. S. 285 (1869), here reiterated for purposes of emphasis, in which the court stated:

> ". . . the information imparted by the letter was sufficient to put into motion the authority of the court." (p. 293)

*Yaselli* v. *Goss*, 12 F. 2d 396 (2d Cir. 1926), cited as some sort of presumed authority reaffirms all the principles set forth in *Bradley* v. *Fisher*, *supra*, *Randall* v. *Brigham*, *supra*, and specifically holds:



> "(p. 41) With respect to all judicial officers—Justices of the Peace, as well as Judges of the higher courts—the settled law of the Supreme Court of the United States, and I think the plain inclination of the Supreme Court of this State, is that, where they act within their jurisdiction, they are not amenable to any civil action for damages. No matter what their motives may be, they cannot be inquired into."

The special prosecutor, in that case, was held to be immune. Considerable reliance is placed upon *Wade* v. *Bethesda Hospital*, 357 F. Supp. 671 (S. D. Ohio, 1971). This case and cases like it have been fully discussed in Petitioners' Brief and are, of course, distinguishable from the present fact situation, for the reason that authority to act in each instance and particularly in *Wade* had been proscribed by legislation.

None of the cases cited by Petitioner American Civil Liberties Union in support of the proposition

> "Indiana law provides no immunity for acts taken in the clear absence of personal jurisdiction." (p. 15)

supports said proposition.

*Dietrichs* v. *Shaw*, 43 Ind. 175, 179 (1873) involved the actions of a justice of the peace, a judicial official with limited jurisdiction. The case was not concerned with an approval. A man was ordered jailed pursuant to a void warrant.

*State* v. *Libbert*, 96 Ind. A. 84, 90, 177 N. E. 873, 875 (1931) involved a mayor acting as a city judge with limited jurisdiction. He was found to be immune for his acts. The case stands as substantially supportive of the position espoused by Judge Stump. The case states (p. 874):

> "That by 'jurisdiction of the subject-matter' is not meant simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs."

*Libbert* further holds (p. 875):

> "There is a distinction that must be kept in mind in cases with a question to be decided by a court is whether there

> is any jurisdiction, and in a doubtful case the judge is not to be penalized when he decides that he has jurisdiction, and on appeal the higher court may decide he had none."

*State ex rel. Board of Sanitary Commissioners* v. *Superior Court*, 220 N. E. 2d 336 (1966) (p. 17 Amicus Brief of American Civil Liberties Union) involves the propriety of an issuance of a Writ of Prohibition and states:

> "Jurisdiction is the right and authority to hear and determine a cause of action, in this case, the equitable remedy of injunction."

The case has nothing whatsoever to do with judicial immunity.

Finally, *State* v. *Wolever*, 26 N. E. Rptr. 762 (1891) (p. 16 Civil Liberties Brief) establishes with considerable eloquence the bases of the doctrine of judicial immunity in Indiana. It dwells upon the important distinction, regarding the application of the doctrine, between courts of limited jurisdiction and courts of general jurisdiction.

With respect to the doctrine as it exists in Indiana, the court states (p. 764):

> "While it may at first blush seem unjust to assert a rule so broad [judicial immunity] as to cover cases of alleged fraud, corruption, or oppression . . . reflection will show that it is not only based upon almost innumerable precedents, running back to time immemorial, but that it is founded upon broad principles of right of the soundest public policy. . . . it is absolutely essential, not only to the well being of society, but to the preservation of our government in its integrity, that the independence of the judiciary be preserved. By this is not meant that they should not be held responsible for official misconduct. Our laws wisely provide for their punishment criminally for official malfeasance, and the Constitution makes for provision for their impeachment and removal in a proper case. This, however, is a recognition of their responsibility to the public—to the state—and not to the individual. . . ."
>
> ". . . whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits."



> ". . . it is said, however, that while this may be the rule with respect to courts of general jurisdiction, it is not the rule as applied to courts of special or limited jurisdiction. . . . When a court of limited jurisdiction has in a given case jurisdiction of the subject-matter and of the persons interested, the same immunity is accorded to the judge or magistrate that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark that by 'jurisdiction of the subject-matter' is not meant simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs (citation). In the latter case, it is said that by 'subject-matter' is meant the abstract thing, and not the particular case. *It is said that in courts of general jurisdiction an action never lies against the judge because he has jurisdiction of all causes.* (Emphasis added.) In courts of limited jurisdiction, it lies only when he exceeds that jurisdiction, and therefore is not in the exercise of his judicial authority."

Finally, in defining "excess of jurisdiction" in Indiana, the court says:

> "In our opinion, there is such excess of jurisdiction only when the entire action of the court has been extra-jurisdictional—that is, when he has assumed the jurisdiction which has never existed; . . ."

The Brief Amicus of Civil Liberties Union suffers from a loss of credibility and relevance because of such attempts to misstate authority in support of insupportable contentions. Said Petitioners' efforts (p. 27 of its Brief) to deprive the Circuit Courts of Indiana of subject-matter jurisdiction over the contents of the petition here in question are an example of intentional distortion. Ignored is the fundamental concept in applying the doctrine of judicial immunity that said immunity is lost by a court of general jurisdiction only when it acts in "clear absence of all jurisdiction", *Bradley* v. *Fisher*, 13 Wall. 335. The test for clear absence of all subject-matter jurisdiction is "a definitive statutory or common law bar". *Jacobson* v. *Schaefer* (7 Cir. 1971), 441 F. 2d 127.

The legislative enactments of I. C. § 16-13-13-3 contain no definitive express statutory prohibition of Judge Stump's jurisdiction to deal with Ora McFarlin's petition, said statutes being confined to the establishment of procedures for the sterilization of institutionalized persons. The attempt by Civil Liberties to apply the interpretative doctrine of *expressio unius est exclusio alterius* is and should be unavailing since it has never been applied in the context of the application of the doctrine of judicial immunity, and to apply it to defeat judicial immunity under the facts of this case would be to engage in "nice questions of jurisdiction", prohibited in applying the doctrine. *Sullivan* v. *Kelleher* (1st Cir. 1968), 405 F. 2d 486.

The remaining portions of Civil Liberties Amicus Brief are of no value because of the unfounded conclusions and unsupported legal principles scattered throughout.

## VI.

## REPLY TO BRIEF AMICUS CURIAE: NATIONAL CENTER FOR LAW AND THE HANDICAPPED.

The Amicus Brief of the National Center for Law and the Handicapped, Inc. is largely irrelevant. If it has value, that value is negative in that its entire thrust is emotional, its only concern being to repeatedly cry out against the outrage of sterilization.

At the outset, in its Statement of the Case, it erroneously and improperly states:

> "Judge Stump signed the petition, thus ordering the sterilization." (p. 3)

It advises the court that *Wade* v. *Bethesda Hospital, supra,* is a reliable authority to support its position.

It proceeds upon the erroneous presumption that in order for a court of general jurisdiction to be entitled to immunity, its acts must be founded upon specific, permissive legislative enactments, ignoring the undisputed rule with respect to judicial immunity hereinbefore set out.



It erroneously presumes that every act of a court of general jurisdiction is appealable and that any act, presumably, which cannot be appealed amounts to a denial of due process.

It proposes that the right to appeal is an essential element for the justification of the doctrine of judicial immunity, citing as authority for that position some Law Review articles. This Amicus Brief ignores the precepts of judicial immunity set forth in *State ex rel. Egan* v. *Wolever, supra,* to-wit (p. 764):

> It is absolutely essential not only to the well-being of society, but to the preservation of government in its integrity, that the independence of the judiciary be preserved. By this is not meant that they should not be held responsible for official misconduct. Our laws wisely provide for their punishment criminally for official malfeasance, and the Constitution makes provision for their impeachment and removal in a proper case. *This, however, is a recognition of their responsibility to the public—to the state—and not to the individual.* (Emphasis added.)

## VII.

## BRIEF AMICUS CURIAE: AMERICAN COALITION OF CITIZENS WITH DISABILITIES, ET AL.

The Amicus Brief of the American Coalition of Citizens With Disabilities, et al., is similar to the other Amicus Briefs in its remarkably bold distortions. This Brief likewise presumes that an order was issued by Judge Stump. Apparently because its authors wished it were so, the Brief asserts, as do the others, that because the court's act was not by specific permissive legislation authorized, it was undertaken without any jurisdiction whatsoever.

The Brief cites *Wade* v. *Bethesda Hospital, supra,* as supportive authority.

It attempts to mislead the court (p. 21) by stating that at the time the Judge's approval was signed in 1971, there was a case in Indiana which specifically prohibited parents from consenting to surgical sterilization of their children. As previously ind-

cated, *A. L. v. G. R. H.*, 325 N. E. 2d 501, was a case of first impression in Indiana and was decided in 1975.

This Amicus concedes that Judge Stump possessed jurisdiction to consider the petition and likewise concedes that he had jurisdiction to determine if he had jurisdiction but then, without citing any authority whatsoever, simply asserts that his act of approval was "beyond his judicial authority". (p. 26)

Looking back, it might be said that on the innumerable occasions judges have made mistakes, it would appear that they acted beyond their judicial authority. Herein lies the core of the complaint of all Amici: They want the doctrine of judicial immunity abolished or so altered that judges, even judges of courts of general jurisdiction, would labor under a continual threat of liability. They want the right to subject the judiciary to ridicule.

Implicit within the doctrine of judicial immunity is the notion of final authority. When it was stated that there is an "aura of deism which surrounds the bench" it was to advise that judges of courts of general jurisdiction are, except in those instances where their acts have been specifically proscribed, answerable to no man.

Respectfully submitted,

GEORGE E. FRUECHTENICHT,
Mezzanine Floor,
Indiana Bank Building,
Fort Wayne, Indiana 46802,
219-422-9454,

WILLIAM F. MCNAGNY,
Third Floor Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
219-423-9551,

*Counsel for Petitioner,*
*Harold D. Stump.*

MOTION FILED
DEC 19 1977

FILED
JAN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 76-1750**

HAROLD D. STUMP, *et al.*,

*Petitioners,*

—v.—

LINDA KAY SPARKMAN and
LEO SPARKMAN,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE INDIANA CIVIL LIBERTIES UNION, AND THE MENTAL HEALTH LAW PROJECT, TO FILE BRIEF *AMICI CURIAE*
## and
## BRIEF *AMICI CURIAE*

BRUCE J. ENNIS
JOEL M. GORA
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

PAUL FRIEDMAN
Mental Health Law Project
1220 19th Street
Washington, D.C. 20036

LAWRENCE M. REUBEN
Indiana Civil Liberties Union
445 No. Pennsylvania Street
Indianapolis, Indiana 46204

*Attorneys for Amici Curiae*

In The
SUPREME COURT OF THE UNITED STATES

No. 76-1750

HAROLD D. STUMP, et al.,
Petitioner,

v.

LINDA KAY SPARKMAN
and LEO SPARKMAN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

## MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE INDIANA CIVIL LIBERTIES UNION, AND THE MENTAL HEALTH LAW PROJECT FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union, the Indiana Civil Liberties Union, and the Mental Health Law Project respectfully move, pursuant to Rule 42 of this Court's rules, for leave to file the within brief amici curiae. Counsel for the Respondents has consented to the filing of this brief. */ Counsel for the Petitioners have refused consent.

*/ A copy of that letter is being filed with the Clerk.

The American Civil Liberties Union is a nationwide, non-partisan organization of two hundred thousand members, dedicated to defending the principles embodied in the Bill of Rights to the Constitution. The Indiana Civil Liberties Union is the state affiliate of the ACLU, operating in Indiana.

The ACLU and its affiliates have a deep interest in preserving the vital role of 42 U.S.C. §1983 as a deterrent to official lawlessness. Accordingly, the ACLU has sought to maintain effective remedies for deprivations of civil rights by state officials of every kind. ACLU attorneys represented petitioners in Pierson v. Ray, 386 U.S. 547 (1967), and Scheuer v. Rhodes, 416 U.S. 232 (1974). The ACLU has also participated as amicus in O'Connor v. Donaldson, 422 U.S. 563 (1975), and in other cases to support effective remedies for persons whose civil rights have been violated, in the belief that such judgments can ensure greater fidelity to constitutional obligations by state officials.

Sterilization abuse has been another large and growing concern of the ACLU, and ACLU attorneys, together with the Reproductive Freedom Project of the ACLU Foundation, have represented many women seeking to remedy and deter the resulting violations of substantive



and procedural rights. E.g., Walker v. Pierce, No. 75-2212, 75-2213 (4th Cir. July 26, 1977).

The Mental Health Law Project is a foundation-supported, public-interest organization dedicated to the protection and advocacy of persons who are labeled as mentally or developmentally disabled.

The Project has made tangible progress in safeguarding the civil rights of mentally handicapped citizens by seeking and often obtaining relief through the court system in such landmark cases as Wyatt v. Stickney [Hardin], 325 F.Supp. 781 (M.D. Ala. 1971), (hearings on standards ordered), 334 F.Supp. 1341 (N.D. Ala. 1971), enforced, 344 F.Supp. 373, 387 (N.D. Ala. 1972), affirmed in part, modified in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. Nov. 8, 1974) (right to treatment and sterilization safeguards); Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972) (right to education); NYSARC v. Carey, 393 F.Supp. 715 (E.D. N.Y. 1975), 357 F.Supp. 752 (E.D. N.Y. 1973) (right to protection from harm); and O'Connor v. Donaldson, 422 U.S. 537 (1975) (right to liberty).

The Mental Health Law Project has a long-standing interest in both substantive issues involved in the instant case -

sterilization and the doctrine of judicial immunity. In Wyatt v. Stickney, the Project was successful in its efforts to have Alabama's involuntary sterlization statute held unconstitutional. In connection with that litigation, the Project recommended standards to the district court which would protect mentally retarded residents of Partlow State School from having so-called "voluntary" sterlizations imposed upon them for administrative or management reasons not in their own best interest, while at the same time preserving the option of voluntary sterilization for residents who were competent and who genuinely desired to undergo this procedure. At present, the Project is representing the Connecticut Association for Retarded Citizens and an individual in Virginia in two separate cases concerning sterilization of mentally retarded persons. The Project has also been successful in having certain state mental health officials held in contempt or assessed with monetary damages for their failure to protect the constitutional rights of mentally handicapped persons under their supervision.

Amici thus have a strong interest in the issues presented by this case, and more importantly, extensive experience with those issues. With the benefit of this experience, Amici will make arguments which will not, to our acknow-



ledge, be made by the parties. The brief submitted with this motion will argue that this is an inappropriate case to consider expansion of the judicial immunity presently available under Pierson v. Ray, 386 U.S. 547 (1967), and Bradley v. Fisher, 80 U.S. 355 (1871), and suggest reasons why the petition for certiorari might appropriately be dismissed as improvidently granted. Amici will demonstrate the relevance of 42 U.S.C. §1988 to the immunity question resolved by the Court of Appeals, and argue that §1988 supports the decision below.

Finally, the brief provides the Court with the legislative history of the Civil Rights Act of 1871, crucial for understanding the hopes and expectations the 42nd Congress had for what is now 42 U.S.C. §1983.

In order to present this analysis, Amici respectfully move for leave to file the within brief.

Respectfully submitted,

BRUCE J. ENNIS
c/o American Civil
Liberties Union
22 East 40th Street
New York, New York 10016

TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ..... | i |
| TABLE OF AUTHORITIES ..... | ix |
| INTEREST OF AMICI ..... | 1 |
| STATEMENT OF THE CASE ..... | 2 |
| SUMMARY OF ARGUMENT ..... | 4 |
| ARGUMENT ..... | |
| I. UNDER SETTLED LAW, DEFENDANT STUMP IS NOT ENTITLED TO JUDICIAL IMMUNITY BECAUSE HE ACTED IN THE CLEAR ABSENCE OF PERSONAL JURISDICTION ..... | 8 |
| A. Federal Law Provides No Immunity for Acts Taken in the Clear Absence of Personal Jurisdiction .. | 9 |
| B. Indiana Law Provides No Immunity for Acts Taken in the Clear Absence of Personal Jurisdiction . | 15 |
| C. The Policies Supporting Judicial Liability for Acts Taken in the Clear Absence of Subject-matter Jurisdiction Require Similar Liability for | |





| | Page |
|---|---|
| Acts Taken in the Clear Absence of Personal Jurisdiction .... | 17 |
| II. UNDER SETTLED LAW, DEFENDANT STUMP IS NOT ENTITLED TO JUDICIAL IMMUNITY BECAUSE HE ACTED IN THE CLEAR ABSENCE OF SUBJECT-MATTER JURISDICTION ..... | 22 |
| A. General Jurisdiction Over "All Other Causes, Matters and Proceedings" Is Not Subject-Matter Jurisdiction To Order a Tubal Ligation ..... | 23 |
| B. Jurisdiction to Determine Jurisdiction Is Not Subject-Matter Jurisdiction Sufficient to Support Judicial Immunity ..... | 29 |
| C. The Court of Appeals' Holding That Petitioner Acted in the Absence of Subject-Matter Jurisdiction Was Not Grounded on His Procedural Errors, Irregularities, or Deficiences .. | 31 |
| III. 42 U.S.C. §1988 REQUIRES THE ADOPTION OF STATE IMMUNITY LAW WHERE THAT LAW BETTER SERVES THE REMEDIAL POLICIES OF §1983 | 34 |

Page

IV. 42 U.S.C. §1983 WAS INTENDED TO ABOLISH COMMON LAW JUDICIAL IMMUNITY, AND TO RENDER JUDGES EQUALLY LIABLE WITH OTHER OFFICIALS FOR DEPRIVATIONS OF CIVIL RIGHTS ..... 41

CONCLUSION ..... 51



TABLE OF AUTHORITIES

Page

Cases:

A.L. v. G.R.H., 325 N.E. 2d 501 (Ind. App. 1975) ..... 24

Barr v. Mateo, 360 U.S. 564 (1959) 39

Belcher v. Stengel, 50 L. Ed 2d 269 (1977) ..... 5

Bradley v. Fisher, 80 U.S. (13 Wall) 355 (1871) ..... passim

Cuiska v. City of Mansfield 250 F. 2d 700, (6th Cir. 1957) ..... 11,21

Dietrichs v. Shaw, 43 Ind. 175 (1873) ..... 16

Duba v. McIntyre, 501 F. 2d 590 (8th Cir. 1874) ..... 12

Grow v. Fischer, 523 F. 2d 875 (7th Cir. 1975) ..... 4

Gregory v. Thompson, 500 F. 2d 59 (9th Cir. 1974) ..... 39

Imbler v. Pachtman, 424 U.S. 409 (1975) ..... 10

| | Page |
|---|---|
| Jacobson v. Schaefer, 441 F. 2d 127 (7th Cir. 1971) ..... | 31 |
| Jobson v. Henne, 355 F. 2d 129 (2nd Cir. 1966) ..... | 37 |
| Kenney v. Fox, 232 F. 2d 288 (6th Cir.,), cert. denied, sub nom. Kenney v. Killian, 352 U.S. 855 (1956) ..... | 11 |
| Nelson v. Knox, 256 F. 2d 312 (6th Cir. 1958) ..... | 37 |
| Mansfield, Coldwater and Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884) ..... | 30 |
| The Marshalsea, 10 Coke 68, 77 (Fraser 1826) ..... | 11 |
| Massachusetts Mutual Life Company v. Ludwig, 426 U.S. 479 (1976) | 9 |
| Monroe v. Pape, 365 U.S. 167 (1961) .....38,47,48,49 | |
| Moor v. County of Alameda, 411 U.S. 693 (1973) ..... | 35,37,38 |
| O'Bryan v. Chandler, 352 F. 2d 987 (10th Cir.) ..... | 12 |
| Pierson v. Ray, 386 U.S. 547 (1967) ..... 4,7,11,18,21,34,37,39,41,42,43,51 | |
| Ryan v. Scoggin, 245 F. 2d 54 (loth Cir. 1957) ..... | 12 |





| | Page |
|---|---|
| Sparkman v. McFarlin, 552 F. 2d 172 (7th Cir. 1977) ..... | 25 |
| State ex rel. Bingham v. Home Brewing Co. of Indianapolis, 182 Ind. 75, 105 N.E. 909 (1914) | 26 |
| State ex rel. Board of Sanitary Commissioners v. Superior Court, 247 Ind. 617, 220 N.E. 2d 336 (1966) ..... | 17 |
| State ex rel. Egan v. Wolevar, 127 Ind. 306, 26 N.E. 762 (1891) | 6,16 |
| State v. Libbert, 96 Ind. App. 84, 177 N.E. 873 (1931) ..... | 6,17 |
| Sullivan v. Kelleher, 405 F. 2d 486 (1st Cir. 1968) ..... | 32,33 |
| Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) ....6,36,37,38,39,40 | |
| The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959) ..... | 5 |
| United States v. Price, 383 U.S. 787 (1966) ..... | 48 |
| Wade v. Bethesda Hospital, 357 F. Supp. 671 (S.D. Ohio 1971)... .....11,12,12,27,28,39 | |
| Williams v. Sepe, 487 F. 2d 913 (5th Cir. 1973) ..... | 32,33 |

| | Page |
|---|---|
| Wood v. Strickland, 420 U.S. 308 (1975) ..... | 39 |
| Yaselli v. Goff, 12 F. 2d 396 (2nd Cir. 1926) .....9,10,12,20,34 | |
| **Federal Statutes:** | |
| 42 U.S.C. §1983 ..... | passim |
| 42 U.S.C. §1985(3) ..... | 3 |
| 42 U.S.C. §1988 .....6,34,35,36,37,38,44 | |
| Civil Rights Act of 1866..... | 48,49,50 |
| Civil Rights Act of 1871 ....7,8,11,43,49 | |
| **State Statutes:** | |
| I.C. 16-13-13-1 ..... | 26,27 |
| I.C. 16-13-13-2 ..... | 26,27 |
| I.C. §33-4-4-3 ..... | 23,25,27 |
| Acts 1974, P.L. 60, §1 ..... | 27 |
| **Other Authorities:** | |
| Cong. Globe, 42 Congress, 1st Sess. ..... | 8,45,46,47,48,49 |





| | Page |
|---|---|
| Note, Immunity of Federal and State Judges From Civil Suit--Time for a Qualified Immunity," 27 Case Western Reserve L. Rev. 683 (1977) ..... | 43 |
| Note, Liability of Judicial Officers Under 42 U.S.C. §1983, 79 Yale L.J. 322 (1969) | 43 |
| Stampp, The Era of Reconstruction, 1865-1877 (Knopt 1965) ..... | 47 |

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-1750

---

HAROLD D. STUMP, et al.,

Petitioners,

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,

Respondents,

---

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

# BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE INDIANA CIVIL LIBERTIES UNION, AND THE MENTAL HEALTH LAW PROJECT, AMICI CURIAE

## INTEREST OF AMICI

The interest of amici appears from the foregoing motion.

## STATEMENT OF THE CASE

In 1971, defendant Judge Harold D. Stump "approved" a petition brought by defendant Ora McFarlin to have her 15-year-old daughter, Linda, sterilized. That "approval" was not sanctioned by Indiana statutory authority or by Anglo-American common law. No guardian ad litem was appointed to represent Linda's interest. She received neither notice nor hearing before the approval. She had no knowledge that any approval had been given, or even that sterilization had taken place, since it was described to her as an appendectomy. Although the Circuit Court on which Judge Stump sits is a court of record, the petition was never filed. For these reasons, Linda Sparkman had no opportunity to contest or to appeal the approval that authorized her sterilization.

Linda and Leo Sparkman, whom she subsequently married, brought an action seeking damages under 42 U.S.C. §1983 and



1985(3), contending that the actions of the defendants in sterilizing her or causing her to be sterilized violated her constitutional rights. The district court for the Northern District of Indiana, Fort Wayne division, dismissed the action and held that Judge Stump was acting within his jurisdiction and therefore immune from suit. The court further implicitly held that the other defendants were clothed with Judge Stump's immunity by ruling that their actions, taken under color of an immune official's actions, could not be "state actions" within the meaning of 42 U.S.C. §1983. The Court of Appeals for the Seventh Circuit reversed, holding that Judge Stump's "approval," unsupported by statutory or common law authority, was entered in the complete absence of subject matter jurisdiction.

## SUMMARY OF ARGUMENT

This case raises no novel questions of law. Judge Swygert, writing for an unanimous panel in the Court of Appeals, dealt with the judicial immunity issue according to the settled precedents of Bradley v. Fisher, 80 U.S. (13 Wall) 355 (1871) and Pierson v. Ray, 386 U.S. 547 (1967), breaking no new ground. Amici will demonstrate below that respondent is correct in arguing that the Court of Appeals committed no error in reversing the district court's Rule 12(b)(6) dismissal on the grounds of judicial immunity.[1] Accordingly, Amici

1 The Court of Appeals had no occasion to consider the district judge's further ruling that there could be no state action to base actions against the remaining private defendants if Judge Stump were immune. However, that Court recently criticized the theory relied on by the district court, noting the problems caused by extending immunity to private citizens acting in concert with immunized officials. See Grow v. Fischer, 523 F. 2d 875, 878-879 (7th Cir. 1975). Should this Court reverse the [Footnote continued]



suggest that the decision below be affirmed.

It is possible, of course, that the Court granted certiorari in order to reconsider the scope of judicial immunity. If so, Amici respectfully suggest that this is a particularly inappropriate case to undertake such a reconsideration, and that the Court might instead dismiss the petition for certiorari as improvidently granted. Belcher v. Stengel, 50 L. Ed. 2d 269 (1977); The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959). Two considerations support this recommendation. First, because Judge Stump was on clear and explicit notice that he would have no immunity under Indiana law for any acts taken in the clear absence of

[Footnote 1 continued]
decision below, this case should be remanded to permit the Court of Appeals to consider whether persons acting in concert and conspiracy with judges should be clothed with immunity as well.

personal jurisdiction,[2] the imposition of liability against him for such acts here is neither surprising nor unfair, nor does it represent an attempt by federal courts to require stricter standards of state judicial behavior than the state, in its own wisdom, has decreed. Second, and of greater importance, 42 U.S.C. §1988 directs federal courts in civil rights cases to apply either federal or state immunity law, whichever better serves the remedial purposes of §1983. Compare Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). Therefore, if the federal immunity rule under Bradley were broadened to afford Judge Stump immunity, respondents would

2 See, e.g., State ex rel. Egan v. Wolevar, 127 Ind. 306, 315, 26 N.E. 762, 765 (1891); State v. Libbert, 96 Ind. App. 84, 90, 177 N.E. 873, 875 (1931) (en banc), reh. denied, id., 180 N.E. 757 (1932). See generally infra, Point I B. There has been no claim here, nor could there be, that Judge Stump had personal jurisdiction over Linda Sparkman, or that he would have had such jurisdiction but for some procedural irregularity or defect.



be entitled to application of Indiana law, which would then be better suited to remedy the deprivation of their civil rights. In short, even if the federal immunity rule of Bradley were broadened, , respondents would prevail. Accordingly, in the circumstances of this case reconsideration should not be undertaken because it would be in the nature of an advisory opinion.

Finally, as we will argue, Pierson itself rests on an incorrect reading of the legislative history of §1 of the Civil Rights Act of 1871, and represents a radical departure from, and constriction of, the federal remedies Congress intended to provide in federal forums to protect federal constitutional rights. The intentions of the 42nd Congress, which enacted §1983, argue strongly against further broadening of judicial immunity. Amici recognize that the Court is unlikely to reconsider Pierson and do not request the Court to do so. However, if settled law of judicial immunity is to be reconsidered

in this case, the Court should restore the remedies which the Civil Rights Act of 1871 intended to provide against the wilful deprivation of rights "independent of law, uncontrolled by magistrates." [3]

## ARGUMENT

### I UNDER SETTLED LAW, DEFENDANT STUMP IS NOT ENTITLED TO JUDICIAL IMMUNITY BECAUSE HE ACTED IN THE CLEAR ABSENCE OF PERSONAL JURISDICTION.

Petitioners' brief does not address the question of personal jurisdiction.[4]

---

3 Senator Sherman of Ohio (summing up the conference report), Cong. Globe, 42d Cong., 1st Sess., Apr. 19, 1871, p. 820, col. 2.

4 Although the Court of Appeals did not reach the issue of personal jurisdiction, relying on the absence of subject-matter jurisdiction for its finding that Judge Stump was not immune, respondents' claim that the clear absence of personal jurisdiction deprived Judge Stump of
[Footnote continued]



Apparently, petitioners' argument is that once a judge demonstrates that he had subject-matter jurisdiction, he is protected by judicial immunity, even if he acted without any semblance of personal jurisdiction. Petitioners are wrong. Adoption of their position would work a major, restrictive change in the current law of judicial immunity.

#### A. Federal Law Provides No Immunity for Acts Taken in the Clear Absence of Personal Jurisdiction

In 1927, after briefing and oral argument, this Court affirmed a decision of the Court of Appeals for the Second Circuit which stated existing judicial immunity law as follows: "'where a judge has full jurisdiction of the subject matter and of the parties, he is not liable civilly where he acts erroneously, illegally or irregularly ...'" Yaselli v. Goff, 12 F. 2d 396, 402

---

[Footnote 4 Continued]
immunity was fully presented to the courts below, and can be used here as an alternative ground of decision. Massachusetts Mutual Life Company v. Ludwig, 426 U.S. 479 (1976).

(2d Cir. 1926), aff'd mem., 275 U.S. 503 (1927) (emphasis added).[5] And a careful reading of the leading case of Bradley v. Fisher, 80 U.S. 335 (1872), as well as a review of relevant federal and Indiana case law generally, shows clearly that before a judge can invoke judicial immunity for his actions, he must have both personal and subject-matter jurisdiction.[6]

The petitioners' failure to cite, distinguish, or attack any of these holdings in their brief cannot cause this large and settled body of law to disappear. Because the Sparkmans alleged --and defendants did not dispute--that Judge Stump lacked personal jurisdiction in this case, the Court of Appeals correctly held that the motion to dismiss on grounds of judicial immunity was improperly granted.

5 Yaselli was cited extensively and reaffirmed by this Court in Imbler v. Pachtman, 424 U.S. 409 (1975).

6 English law, from which American law of judicial immunity derives, appears similarly to have denied judicial immunity where a [Footnote continued]



Federal courts considering the question have long expressly recognized that judicial immunity requires personal jurisdiction. The Sixth Circuit has stated that "judges of courts of superior or general jurisdiction are not liable for civil action for their judicial acts where jurisdiction exists over the subject matter and the defendant."Cuiska v. City of Mansfield, 250 F. 2d 700, 702 (6th Cir. 1957) (emphasis added).[7] See also Kenney v. Fox, 232 F. 2d 288 (6th Cir.), cert. denied sub nom. Kenney v. Killian, 352 U.S. 855 (1956). According to the Eighth Circuit, "a useful test has been suggested in Wade v. Bethesda Hospital, where the court said:

[Footnote 6 Continued]
court acts in clear absence of personal jurisdiction. The Marshalsea, 10 Coke 68, 77 (Fraser 1826).

7 Although Cuiska v. City of Mansfield was decided before this Court's decision in Pierson v. Ray, 386 U.S. 547 (1967), Cuiska v. City of Mansfield, in common with cases decided in other circuits, held that Bradley v. Fisher was applicable to cases arising under the Civil Rights Act of 1871.

'we begin by defining the concept of jurisdiction as it is used in the context of judicial immunity. The cases are clear that the term jurisdiction means that the judge must have both jurisdiction over the person and subject matter if he is to be immune from suit for an act performed in his judicial capacity.'" Duba v. McIntyre, 501 F. 2d 590, 592 (8th Cir. 1974), citing Wade v. Bethesda Hospital, 357 F. Supp. 671 (S.D. Ohio 1971) (emphasis added). According to the Tenth Circuit, "It is a principle of universal acceptation in its relation to judges at all levels that a judge is not liable in damages resulting from an order entered or a judgment rendered in an action or proceeding over which the court has jurisdiction of the subject matter and of the parties..." Ryan v. Scoggin, 245 F. 2d 54, 58 (10th Cir. 1957) (emphasis added). See also O'Bryan v. Chandler, 352 F. 2d 987, 988 (10th Cir.), cert. denied, 384 U.S. 926 (1969). And as noted above, the Second Circuit agrees. Yaselli v. Goff, 12 F. 2d 396, 402 (2d Cir. 1926), aff'd



mem., 275 U.S. 503 (1927). In Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971), a federal district court held that a probate judge who ordered sterilization of the plaintiff was not protected by the doctrine of judicial immunity. Although the basis for that holding was that there was no set of conditions under Ohio law which would permit such an order, the court did stress that a judge must have jurisdiction over the person if he is to be immune from suit for an act performed in his judicial capacity. (337 F. Supp. at 673 ).

Although certain language in Bradley v. Fisher, 80 U.S. 335 (1872), is cited by petitioners to support their contention that subject-matter jurisdiction alone is sufficient to establish judicial immunity, a careful reading of Bradley shows that the Court focused its attention upon subject-matter jurisdiction only because the disputed contemptous acts had occurred

directly in the presence of the judge.[8] This is made explicit by the Court's statement, conveniently omitted from petitioners' Brief, that "the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reason." 80 U.S. at 352 (emphasis added).

8 The Bradley case was brought by a lawyer who had represented a defendant alleged to have participated in the assassination of President Lincoln. During a recess, as Judge Fisher was descending from the bench, Bradley accosted him in a "rude and insulting manner" and charged the judge with having insulted him from the bench during the trial. The judge disclaimed any intention of insulting Bradley and assured Bradley that he entertained for him no feelings other than those of respect. Bradley refused to accept that disclaimer and threatened the judge with "personal chastisement." Immediately after discharging the jury in that case, Judge Fisher entered an order from his chambers striking Bradley's name from the roll of attorneys who could practice before the court. Subsequently, Bradley brought an action for damages against Judge Fisher.



As the Bradley court also observed, "the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice,..." 80 U.S. at 354. In Bradley, the alleged insulting language and offensive conduct toward the judge occurred in the direct presence of the judge during a recess. Because of this the Supreme Court reasoned that the judge had personal jurisdiction when he acted. Thus, Bradley supports the proposition that judicial immunity applies where a judge has acted with both subject-matter and personal jurisdiction.

### B. Indiana Law Provides No Immunity for Acts Taken in the Clear Absence of Personal Jurisdiction

Indiana law is in complete accord. Only two years after this Court's decision in Bradley v. Fisher, the Indiana Supreme Court set forth its understanding of the common law: "judicial officers are not

liable for mistakes of judgment or erroneous decision, but they are liable for trespasses committed under color of judicial authority where they have no jurisdiction over the parties or the subject-matter." Dietrichs v. Shaw, 43 Ind. 175, 179 (1873) (emphasis added). Some years later, when that court reconsidered the result in Dietrichs,[9] it steadfastly adhered to its earlier view, repeating it twice, that judicial immunity is not available for actions taken in the clear absence of personal jurisdiction. State ex rel. Egan v. Wolevar, 127 Ind. 306, 26 N.E. 762 (1891). The court observed: "when a court ...has in a given case jurisdiction of the subject-matter and of the parties interested ... [it has] immunity." Id., 127 Ind. at

9 The Indiana Supreme Court in Dietrichs had affirmed a damage judgment against a judge who had caused a defendant to be improperly arrested. The defendant had received actual, but technically insufficent, notice of the action. As the Egan court recognized, Judge Dietrichs had attempted properly to secure personal jurisdiction over Shaw, and his immunity was not divested by his mistake.



315, 26 N.E. at 765 (emphasis added). See also id., 127 Ind. at 319-20, 26 N.E. at 766. And in State v. Libbert, 96 Ind. App. 84, 90, 177 N.E. 873, 875 (1931) (en banc), reh. denied, 96 Ind. App. 84, 180 N.E. 757 (1932), the Indiana Court of Appeals held that "where there is a total lack of jurisdiction of either the person or the subject-matter, the judge's office is no protection to him." Indiana courts have not waivered from that view, and have consistently held that a judge has power to hear and determine an action only where he has jurisdiction over the subject-matter and the parties. State ex rel. Board of Sanitary Commissioners v. Superior Court, 247 Ind. 617, 621, 220 N.E. 2d 336 (1966).

### C. The Policies Supporting Judicial Liability for Acts Taken in the Clear Absence of Subject-matter Jurisdiction Require Similar Liability for Acts Taken in the Clear Absence of Personal Jurisdiction

It is not surprising these courts have held that there is no judicial immunity when a court acts in the clear absence of personal

jurisdiction as well as subject-matter jurisdiction. The policies canvassed in Bradley and Pierson, which authorize remedies against judges who act when "jurisdiction" is not even arguably present, are as applicable to personal jurisdiction as to subject-matter jurisdiction. The difference between acting in excess of personal jurisdiction (for example, where service was attempted but improperly effectuated) and acting in the clear absence of personal jurisdiction (where a defendant had been convicted and sentenced without notice or trial) is at least as clear as the difference between excess of and absence of subject-matter jurisdiction described by Justice Field in Bradley v. Fisher.

Justice Field found it useful in Bradley v. Fisher to analyze the scope of judicial immunity by using a hypothetical example of a probate judge attempting to decide a criminal case. Such a judge, the Court reasoned, would have no immunity because he would have acted in the clear



absence of subject-matter jurisdiction. Other examples can be similarly useful here. Consider Judge A, with jurisdiction over criminal cases who, in the absence of any grand jury indictment or prosecutorial information, or trial or notice, draws up a judgment of conviction for murder and a sentence of death against some person who has offended him, and immediately orders the prescribed punishment. Or Judge B, with jurisdiction over civil commitment, who suddenly, on his own motion and without notice or hearing, commits a neighbor to the county hospital to remove the neighbor from a land auction each plans on attending the next day. Or Judge C, with general jurisdiction, who suddenly enters a judgment without notice or hearing permitting a mother to cut off her daughter's legs, in the words of the instant petition, "to prevent unfortunate circumstances to occur." (Appendix at A25) Each of these judges is in precisely the same situation as the hypothetical probate judge trying criminal cases hypothesized by Justice Field in Bradley v. Fisher. Each lacks any

semblance of personal jurisdiction and each therefore lacks immunity. Jurisdiction is as wholly absent in our hypotheticals as in Justice Field's.

The policies supporting judicial immunity require no different result. The imposition of liability when personal jurisdiction is so patently absent, like the imposition of liability when subject matter jurisdiction is patently absent, imposes no burden on judges, will not intimidate judges, and will not penalize fearless and principled decision-making. Those circuits which have explicitly defined "clear absence of jurisdiction" as including absence of personal jurisdiction show no increased number of cases against judges, or weakening of judicial independence or principled decision-making. The historical record dating at least from 1926 demonstrates that withdrawing the shield of judicial immunity from actions taken in the clear absence of personal jurisdiction has no deleterious effect on either judicial dockets or behavior. Yaselli v. Goff, 12 F. 2d 396, 402



(2d Cir. 1926). See also, e.g., Cuiska v. City of Mansfield, 250 F. 2d 700, 702 (6th Cir. 1957).

Indeed, the effect is precisely to the contrary. The imposition of liability for this extremely narrow class of cases is essential to the proper functioning of our adversary system. Justice cannot be achieved when only one side to a controversy is heard. The remedies for outrageous judicial conduct taken in the clear absence of jurisdiction which Bradley and Pierson specifically preserve and rely on to check misconduct--namely, appeal and impeachment--are of no avail where, as here, the judicial action is taken in secret, hidden from the public record, and carried to fruition by deception. For these reasons, settled law provides that some semblance of personal as well as subject-matter jurisdiction is a necessary prerequisite for immunity, and that judges can be sued when they act in clear absence of personal jurisdiction.

## II. UNDER SETTLED LAW, DEFENDANT STUMP IS NOT ENTITLED TO JUDICIAL IMMUNITY BECAUSE HE ACTED IN THE CLEAR ABSENCE OF SUBJECT MATTER JURISDICTION.

There can be no doubt, and petitioners do not dispute, that the Court of Appeals correctly stated the rules applicable to judicial immunity, derived from Bradley v. Fisher and Pierson v. Ray. We think it equally clear that the Court of Appeals correctly applied the rule of those cases in holding that Judge Stump acted in the clear absence of jurisdiction. The court's opinion persuasively analyzes the matter, and is well-supported by respondents' brief in this Court. There is no need for amici to rehearse those arguments again. However, the three arguments offered by petitioners by undermine the Court of Appeals' ruling would substantially broaden the category of cases in which immunity has previously been considered appropriate. Amici believe that further analysis of those arguments is therefore necessary.



### A. General Jurisdiction Over "All Other Causes, Matters, and Proceedings," Is Not Subect Matter Jurisdiction To Order a Tubal Ligation.

Petitioner's reliance on an Indiana statute conferring general jurisdiction on the Indiana Circuit Court is misplaced. The statute provides in pertinent part:

> "...and it shall have jurisdiction of all other cases, matters, and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer." I.C. §33-4-4-3.

Petitioners argue that this section clothes Judge Stump with absolute immunity for any "rulings" he makes in connection with anything he chooses to designate a "matter" or "proceeding," apparently without limit as to what those "matters" might involve. That is not, and cannot be, the law.

Petitioners' theory forces them to construe the Indiana Appellate Court's decision

in A.L. v. G.R.H.[10] as leaving intact subject matter jurisdiction over parental requests for tubal ligations, even though that case squarely held that courts of general jurisdiction may not authorize parents to cause tubal ligations to be performed on their children.[11] Petitioners thereby assert that Judge Stump would be immune if he approved a similar petition today. That result is clearly intolerable, and far beyond what A.L. v. G.R.H. contemplates or

10 325 N.E. 2d 501 (Ind. App. 1975).

11 "In 1975, the Indiana Appellate Court in A.L. v. G.R.H., 325 N.E. 2d 501 (Ind. App. 1975) held that parents may not be authorized by courts of general jurisdiction to cause tubal ligations to be performed on their children under any circumstances. The Decision did not, however, remove jurisdiction of such subject matter from the circuit courts. It simply issued a judicial fiat prohibiting such authorizations. Nowhere is it suggested that should such a Petition be presented to a judge of a circuit court in any county in Indiana that he did not have jurisdiction to deal with the Petition." Brief for Petitioners at 18. See also Brief for Petitioners at 27.



Bradley requires. A court of general jurisdiction is still a court of law;petitioners' theory confuses general jurisdiction with the limitless and lawless jurisdiction of an absolute monarch. There is no support in case law, or the policies behind judicial immunity, to construe general jurisdiction statutes to confer subject-matter jurisdiction over petitions by some citizens for "approval" of castration, or amputation, or murder--or sterilization--of their children, or of other persons. The outrageous quality of the examples serves to emphasize the absurdity of petitioners' argument.[12]

The argument that the general jurisdiction provided by I.C. §33-4-4-3 does not include subject-matter jurisdiction to approve the sterilization petition in this case is

12 "There are other examples of extreme and unauthorized remedies not distinguishable from the present case. If Judge Stump were said to be acting validly under the power of courts to create new common law, a judge of general jurisdiction could order, upon an affidavit and petition similar to the one in the instant case, that a United States citizen should be disenfranchised because he is "un-American." Clearly such a remedy would be beyond the judge's general jurisdiction." Sparkman v. McFarlin, 552 F. 2d 172, 176 n. 7 (7th Cir. 1977).

reinforced by the care which the Indiana legislature had taken in other statutes explicitly to grant such jurisdiction over sterilization under narrowly limited circumstances with strict procedural safeguards. "When the law is affirmative that a thing should be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner." State ex rel. Bingham v. Home Brewing Co. of Indianapolis, 182 Ind. 75, 105 N.E. 909, 916 (1914). Section 16-13-13-1 of the Indiana Code authorized sterilization only of institutionalized feeble-minded persons, and then only after notice to the person or a representative, and after an evidentiary hearing. I.C. 16-13-13-2. This proceeding takes place not in the Circuit Court but before a board established by the Superintendent of each public hospital, and any recommendation for sterilization requires approval by the state commissioner of mental health. Only if such an order were granted could there be a proceeding in the circuit court, an



appeal by the person to be sterilized. I.C. 16-13-13-3. Examination of these provisions of Indiana Law compels the conclusion that the statute conferring general jurisdiction on the Indiana circuit courts is no way granted general jurisdiction over sterilization proceedings not specifically provided for. To the contrary, the legislative enactment of I.C. 16-13-13-1 through -3 plainly deprived the circuit courts of subject matter jurisdiction to order the sterilization of Indiana citizens unless those citizens were institutionalized and then only if the statutorily mandated procedures were followed.[13] The analysis urged here is supported by Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971), a case identical with this in all essential respects. In Wade, the district court rejected an argument that a state judge's

13 All Indiana statutes with respect to the sterilization of feeble-minded persons were repealed by Acts 1974, P.L. 60, §1.

sterilization order, entered without any express statutory authority or common law support, was at most in excess of that court's "plenary powers at law and equity." The court found, instead, that jurisdiction was completely absent. It looked to see whether under any conceivable set of circumstances or conditions Ohio law would permit a judge to order a person to submit to sterilization, much as Justice Field in Bradley looked to see whether a probate judge could ever hear a criminal proceeding. In Wade, as in Justice Field's hypothetical, it was clear that the court's order was not within the range of orders and cases over which the court had subject-matter jurisdiction. Here too, as the Court of Appeals correctly held, neither the Indiana general jurisdiction statute nor common law gave Judge Stump subject-matter jurisdiction over petitions for "approval" of tubal ligations.



B. Jurisdiction to Determine Jurisdiction Is Not Subject Matter Jurisdiction Sufficient to Support Judicial Immunity.

Perhaps recognizing that Judge Stump had no subject matter jurisdiction to consider the petition for sterilization, petitioners rely on the Indiana circuit court's unquestioned jurisdiction, to determine its own jurisdiction to create sufficient subject matter jurisdiction to shield Judge Stump with immunity. Brief for Petitioners at 15-18. But that argument consists of no more than the linguistic happenstance that American law uses the word "jurisdiction" in various senses. It proves too much. Justice Field was certain that the hypothetical probate judge in Bradley v. Fisher would have no immunity if he undertook to decide a criminal case, even though (like all judges) probate judges have jurisdiction to consider their own jurisdiction. Plainly, the Court in Bradley did not believe that a probate judge's admitted jurisdiction to consider a criminal indictment brought before him

(if only to reject it) was subject matter jurisdiction sufficient to create immunity. Furthermore, federal district courts regularly take "jurisdiction" over cases which are then dismissed for lack of subject matter jurisdiction (or jurisdiction over the parties), and appellate courts take "jurisdiction" over these dismissed cases.[14] Petitioners' error is patent. It is tautological to contend that a court is disabled from dismissing for lack of jurisdiction by its very consideration of a case. If petitioners are correct--if jurisdiction to consider whether the court has subject matter jurisdiction is the same as subject matter jurisdiction sufficient to create immunity--then judicial immunity exists in each and every case

14 In Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884), for example, this Court, after considering (taking "jurisdiction" over) a suit removed from state court, dismissed for lack of subject matter jurisdiction.



"considered" by a court. Of course, neither Bradley nor the myraid cases before or after contemplated such a result. Accordingly, although the district court correctly asserted that "Judge Stump surely had jurisdiction to consider the petition and to act thereon," it incorrectly held that Judge Stump, ipso facto, had subject matter jurisdiction sufficient to confer immunity.

### C. The Court of Appeals' Holding That Judge Stump Acted in the Absence of Subject Matter Jurisdiction Was Not Grounded on His Procedural Errors, Irregularities, or Deficiencies.

Petitioners contend that the Court of Appeals relied on Judge Stump's procedural errors for its holding that Judge Stump had no subject-matter jurisdiction. Brief at 18-23. Amici agree that immunity is not lost by procedural errors. E.g., Jacobson v. Schaefer 441 F. 2d 127 (7th Cir. 1971). However, the Court of Appeals holding in this case does not rest in any way on the tragic procedural errors committed by Judge Stump.

There is no "error" or "deficiency" here which would have given Judge Stump any better claim to subject matter jurisdiction had he corrected it. The problem is not that notice was improperly given, but that there was no conceivable case or proceeding in which Judge Stump had jurisdiction to order sterilization, whether he properly gave notice or not. Each of the cases cited by petitioners (Brief at 18-23) to support their argument that immunity is not lost through procedural errors or deficiencies is therefore inapposite. For example, in Sullivan v. Kelleher, 405 F. 2d 486 (1st Cir. 1968), cited by petitioners, the court correctly held that a judicial officer was immune where he acted in an eviction case of which defendant had received actual, but legally insufficient, notice. As that court recognized, had there been no error in the notice, subject matter jurisdiction would clearly have been present. Similarly, in Williams v. Sepe, 487 F. 2d 913 (5th Cir. 1973), the defendant judge had subject matter jurisdiction over the criminal contempt charge



of which the plaintiff complained, and the court properly found that this subject matter jurisdiction was not defeated by the judge's error in giving only oral, not written, notice. Here, however, as the Court of Appeals' opinion in this case correctly demonstrates, even with the strictest adherence to procedural niceties Judge Stump had no jurisdiction to order a tubal ligation. Accordingly, the Court of Appeals correctly held that petitioner Stump acted in the clear absence of subject-matter jurisdiction, a holding not dependent on that court's consideration of procedural irregularities.[15]

15 As argued in Point I, supra, Amici also believe that the decision below can be affirmed on the theory that Judge Stump acted in the clear absence of personal jurisdiction. The lack of personal jurisdiction in this case is not based on procedural errors, as in Sullivan v. Kelleher and Williams v. Sepe, supra. Steps necessary to exercise personal jurisdiction were not carried out mistakenly in this case; they were not carried out at all.

## III 42 U.S.C. §1988 REQUIRES THE ADOPTION OF STATE IMMUNITY LAW WHERE THAT LAW BETTER SERVES THE REMEDIAL POLICIES OF §1983

Amici believe that Indiana and federal immunity law each lead to the same result here, and that Judge Stump is liable because he acted in the clear absence of personal and subject-matter jurisdiction. However, if this Court should disagree, or decide to expand the immunity which Bradley, Yaselli, and Pierson currently provide, the decision below must nevertheless be affirmed. When federal and state immunity rules lead to different results in a §1983 case, 42 U.S.C. §1988 obligates federal courts to choose the rule which better serves the remedial purposes of §1983.[16] Therefore, if respondents cannot recover under the Bradley rule, 42 U.S.C. §1988 requires the adoption of the narrower

16 Although the Seventh Circuit did not purport to apply §1988 or Indiana law to this case, its decision is fully supported by, and consistent with, the result required by §1988.



Indiana immunity rule.

When 42 U.S.C. §1983 provides the cause of action, 42 U.S.C. §1988 instructs federal courts what remedial law to apply. Moor v. County of Alameda, 411 U.S. 693, 703 (1973).

Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said

> courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

In Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1968), this Court held that where an issue of damages was not governed by federal statutory law, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v. Cherry, [ 293 F. 2d 401 ] (5th Cir. 1961). The rule of damages, whether drawn from federal or state sources, is a federal rule, responsive to the need whenever a federal right is impaired." (emphasis added). If the Court finds that the Bradley-derived federal rule precludes recovery, it will essentially have found in the words of §1988, that federal law is not "suitable", not "adapted" and "deficient" in protecting and vindicating respondents' civil rights. Sullivan would then require adoption of the Indiana rule since it would better serve the remedial



purpose of §1983 by providing a remedy for the deprivation of Linda Sparkman's civil rights .

The analysis urged here is fully consistent with Pierson v. Ray. Pierson's holding is a negative one--Congress did not intend to abolish the immunities state courts had recognized under common law. Pierson did not hold that Congress intended federal courts to resolve immunity questions without reference to state law when state law is more suitable to the protection of civil rights; §1988 is directly to the contrary, as Sullivan v. Little Hunting Park teaches.[17]

Moor v. County of Alameda, 411 U.S. 693 (1973), holding that §1988 was not

---

17 In Jobson v. Henne, 355 F. 2d 129, 133 (2nd Cir. 1966), and Nelson v. Knox, 256 F. 2d 312, 314 (6th Cir. 1958) (Stewart, J.), courts declined to apply state immunity law that was less protective of civil rights than the Bradley rule. Although each court broadly announced a rule against applying

[Footnote Continued]

"meant to authorize the wholesale importation into federal law of state causes of action," is not to the contrary. The dismissal of a county defendant in a civil rights suit in Moor was for lack of jurisdiction, in accordance with this Court's holding in Monroe v. Pape, 365 U.S. 167 (1961) that §1983 had no application to municipalities. Therefore, §1983 was simply unavilable in Moor to create a cause of action. Here, however, §1983 clearly creates a cause of action against officials of every kind. Immunity (absolute or qualified) is simply a defense which can defeat recovery, and is generally determined on

[Footnote 17 Continued]
state immunity law in civil rights actions to preclude state nullifcation of §1983, neither court cited §1988. Their holdings can be justified on the narrower statutory ground for decision provided by that section: application of the more favorable federal immunity laws was required by §1988, a conclusion affirmed later by Sullivan.



the basis of the requisite factual showing. E.g., Wood v. Strickland, 420 U.S. 308 (1975), Barr v. Matteo, 360 U.S. 564, 574 (1959); Pierson v. Ray, 352 F. 2d 213, 217 (5th Cir. 1965), aff'd on this ground 386 U.S. 547 (1967). [18]

Adherence to Sullivan's direction to choose the state or federal rule which better serves the remedial policies of §1983 will not impair valid state interests, or create unmanageable problems. Apparently, no state extends broader judicial immunity than the federal immunity rule of Bradley v. Fisher. For those states which have decided that justice is better served by holding their judges to a

18 See also Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971) and Gregory v. Thompson, 500 F. 2d 59 (9th Cir. 1974), where plaintiffs recovered damages against judges on §1983 causes of action after factually demonstrating that defendants fell outside the Bradley rules and had acted in the clear absence of jurisdiction.

stricter standard, it is neither unfair nor unjust to permit federal litigants to recover for deprivations of their civil rights where the state rule would permit recovery. The actions of state judges are necessarily taken with knowledge of the liability to which they are subject under state law. Making the federal immunity rule coextensive with the state immunity rule would not be unfair and would not unduly limit the circumstances in which judicial immunity is considered appropriate.

Accordingly, if the Court finds that respondents are not entitled to recover under the federal rule of Bradley v. Fisher, Amici urge that §1988 requires adoption of Indiana immunity law as "the federal rule responsive to the need" for remedying the federal right that has been impaired. Sullivan v. Little Hunting Park, supra at 240.



## IV 42 U.S.C. §1983 WAS INTENDED TO ABOLISH COMMON LAW JUDICIAL IMMUNITY, AND TO RENDER JUDGES EQUALLY LIABLE WITH OTHER OFFICIALS FOR DEPRIVATIONS OF CIVIL RIGHTS

Amici recognize that the Court is unlikely to reconsider its holding in Pierson v. Ray, 386 U.S. 547 (1967), that federal common law judicial immunity is applicable to suits under 42 U.S.C. §1983. We do not urge the Court to do so. However, we believe that the legislative history regarding Congressional intent with respect to judicial immunity under §1983 should nonetheless be available for the Court's examination here for two reasons. First, because the evidence unfiormly suggests that the 42nd Congress was hostile to judicial immunity and sought to abolish it in civil rights actions, the legislative history is strong reason for the Court to decide against broadening the immunity already afforded by Pierson. Second, if the Court decides that the judicial immunity portion of Pierson is to be

reexamined, we believe that close study of the legislative history will compel the Court to overrule Pierson and to restore the remedies the 42nd Congress clearly intended to provide for deprivations of civil rights by all state officials.

Without commenting on the legislative history carefully detailed in the dissenting opinion of Mr. Justice Douglas, the majority opinion in Pierson asserted without analysis or citation that "the immunity of judges for acts within the judicial role is...well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." 386 U.S. at 554-55 (footnote omitted).

However, research has established that immunity was not as well established as Pierson asserted. Of the 37 states existing in 1871, only 13 had adopted absolute immunity, 6 provided only a qualified immunity, 9 had not clearly



resolved the issue, and 9 had not yet faced the issue.[19] Immunity of English judges depended on the court in which the judge sat, and would not have extended to the defendant magistrate in Pierson.[20]

More importantly, as commentators have noted,[21] the language of the predecessor statute for §1983, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, and the legislative history which documents its passage, clearly refute Pierson's suggestion that Congress meant to retain existing judicial immunities for civil rights suits.

19 See Note, Liability of Judicial Officers Under 42 U.S.C. §1983, 79 Yale L.J. 322, 326-27 (1969) [hereinafter, "Yale Note"]. See also Note, Immunity of Federal and State Judges from Civil Suit--Time for a Qualified Immunity," 27 Case Western Reserve L. Rev. 683, 731 [hereinafter "Case Note"].

20 See generally Yale Note, supra n. 19, at 325; Case Note, supra n. 19, at 732 nn. 27-29.

21 See, eg., Yale Note, supra n. 19, at 327-38; Case Note, supra n. 19 at 738-40.

The predecessor statute, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, provides for no exceptions, no immunities. It applied to "any" person who under color of state law deprived "any" person of his federal constitutional or statutory rights.[22]

The legislative history of Section 1 of the Civil Rights Act of 1871 makes it clear that Congress intended to render liable state judges who under color of state law knowingly and willfully deprived persons of their constitutional rights.

22 As altered by the reviser who prepared the Revised Statutes of 1878 and as printed in 42 U.S.C., the statute refers to "every" person who deprives "any" person of his rights. "Every" is just as inclusive as "any", but the origianl parallelism of "any" in describing culprit and victim makes it even clearer that Congress did not intend sub silentio to grant immunity to judges.

The reviser removed other language that made it even clearer no such immunity was intended. As enacted, the section stated that any person shall be liable

[Footnote Continued]



The Congress was concerned not with protecting good judges or other public servants against having to face charges of wrongdoing,but rather with defiance of law by mobs and by bad officials, including judges. Congress was concerned that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."[23] It was shocked at the

[Footnote 22 Continued]
for depriving persons of their constitutional rights, etc., under color of state law, "any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding." (Emphasis supplied)

The reviser lacked authority to alter law substantively. See Revised Statutes of the United States, 1878, Preface, p. 4; Appendix, pp. 1092-93; 19 Stat. 268. ch. 82, §4, as amended by 20 Stat. 27, ch. 26. Title 42 has not been enacted into positive law.

23 Cong. Globe, 42nd Cong., 1st Sess. (Congressman Lowe of Kansas, March 31, 1871 p. 374, col. 3).

record of many judges.[24] It was, indeed, the breakdown of justice that gave rise to

---

24 See, for example:

Senator Sherman of Ohio (summing up conference report): "Spreading terror and violence...now exist unchecked by punishment, independent of law, uncontrolled by magistrates." Cong. Globe, 42nd Cong., 1st Sess., Apr. 19, 1871, p. 820, col. 2.

Congressman Rainey of South Carolina: "The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." Id., Apr. 1, 1871, p. 394, col. 3.

Congressman Beatty of Ohio: "The remedy is needed because of 'prejudiced juries and bribed judges.'" Id.,April 3, 1871, p. 429, col. 2.

Senator Osborn of Florida; "These men with hands stained with blood, hostile to every man who stood by his country during the war, determined by fair means or foul, that loyal men shall not remain in power, ought not to sit upon juries and administer the laws enacted to punish their own crimes." Id., Apr. 13, 1871, p. 654, col. 2.

Congressman Garfield of Ohio: "Even where the laws are just and equal on their face, yet by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the

[Footnote 24 Continued]



the need for legislation. See generally, Monroe v. Pape, 365 U.S. 167, 174-83,

---

[Footnote 24 Continued]

people are denied equal protection." Id., Apr. 4, 1871, App. p. 153, col. 3.

Congressman Porter of Virginia: "The outrages committed upon loyal men there are under forms of law." Id., Apr. 4, 1871, App. p. 277, col. .

Congressman Burchard of Illinois: "... if...in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction ...the State has not afforded to all its citizens the equal protection of the laws." Id., Apr. 6, 1871, p. 315, col. 1.

Senator Pratt of Indiana: "[the laws] only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples." Id., Apr. 6, 1871, p. 505, col. 3.

See also the complaint of a Louisiana loyalist to Carl Schurz that "men who held commissions in the rebel army, who signed the ordinance of secession,...who took a leading part in the rebel movement" were acting as judges in the southern states. Quoted in Stampp, The Era of Reconstruction, 1865-1877 (Knopt 1965) at p. 76.

235-36 (1961).[25]

All the members of Congress who spoke to the issue explicitly stated that the section applied to judges. None disagreed. See Cong. Globe, 42d Cong., 1st Sess., 1871: Congressman Arthur of Kentucky, Mar. 31, 1871, p. 365, col. 3, p. 366, col. 1; Congressman Sheldon of Louisiana, Mar. 31, 1871, p. 368, col. 1; Congressman Lowe of Kansas, Mar. 31, 1871, p. 376, col. 1; Congressman Lewis of Kentucky, Apr. 1, 1871, p. 385, col. 1. Cf. Senator Thurman of Ohio, Apr. 13, 1871, p. 217, col. 1 (Appendix). And see Monroe v. Pape, supra, 365 U.S. at 233, n. 49.

The legislative history of Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, also supports the conclusion that the 1871 Congress did not intend silently to exempt state judges who knowingly and willfully deprived persons of their constitutional rights. It does so because (i) the similar

25 "The purpose and scope of the [statute] must be viewed against the events and passions of the time." United States v. Price, 383 U.S. 787, 801, 803 (1966).



terms of the earlier Act were specifically referred to as a guide to the 1871 Act by its principle sponsor, Congressman Shellabarger, when he introduced the 1871 Act, Cong. Globe, 42d Cong., 1st Sess., 1871, Mar. 28, 1871, p. 319, col. 3, printed in Appendix, p. 68, col. 1 (see also Monroe v. Pape, supra, 365 U.S. at 171); and (ii) the mood of the earlier Congress casts light upon that of the later Congress. President Andrew Johnson vetoed the 1866 Act on the ground, among others, that it subjected state judges to criminal liability for depriving persons of their civil rights. Cong. Globe, 39th Cong., 1st Sess., March 27, 1866, pp. 1679, 1780, col. 2. Congress re-enacted the Act over the President's veto and in so doing specifically stated that it intended that judges who knowingly used their office to deprive persons of their civil rights should be punished.[26]

26 See Senator Trumbull of Illinois, Chairman of the Committee on the Judiciary, who led the successful effort to overrule the veto, at id., Apr. 4, 1966, pp.

[Footnote Continued)

The historical record could hardly be more clear. The 42d Congress stated as clearly as possible that what is now §1983

[Footnote 26 Continued)
1758-59, passim, and in particular:

> "But it is said that under this provision judges of the courts and ministerial officers who are engaged in the execution of any such statutes may be punished...I admit that a ministerial official or a judge, if he acts corruptly or viciously or under color of an illegal act may be and ought to be punished..."
>
> "The assumption that State judges and other officials are not to be held responsible for violations of United States laws, when done under color of State statutes or customs, is akin to the maxim of the English law that the King can do no wrong.It places officials above the law. It is the very doctrine out of which the rebellion was hatched."

See also Senator Johnson of Virginia, id., Apr. 5, 1866, p. 1778, col. 1; Senator Cowan of Pennsylvania, Apr. 5, 1866, p. 1783. Congressman Lawrence of Ohio, the only speaker on the subject in the House, said:

> "It is better to invade the judicial power of the State than permit it to invade, strike down, and destroy civil rights of citizens..." Id., Apr. 7, 1866, p. 1837, col. 1.



was intended to abolish absolute judicial immunity. In light of this record, judicial immunity should not be expanded. And, if Pierson is to be reconsidered, §1983 should be restored to its original design.

## CONCLUSION

For the foregoing reasons, the American Civil Liberties Union, the Indiana Civil Liberties Union, and the Mental Health Law Project urge the Court to dismiss the petition for certiorari as improvidently granted, or to affirm the decision of the Court of Appeals.*

Respectfully submitted,

BRUCE J. ENNIS
JOEL M. GORA
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

* Amici wish to acknowledge the substantial assistance of Charles S. Sims, a candidate for admission to the New York bar, in the research and drafting of this brief.

PAUL FRIEDMAN
Mental Health Law Project
1220 19th Street
Washington, D.C. 20036

LAWRENCE M. REUBEN
Indiana Civil Liberties
Union
445 No. Pennsylvania Street
Indianapolis, Indiana
46204

MOTION FILED
DEC 15 1977

Supreme Court, U. S.
FILED
1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 76-1750

---

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D., and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

---

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

---

RONALD M. SOSKIN
NATIONAL CENTER FOR LAW AND THE HANDICAPPED
1235 North Eddy Street
South Bend, Indiana 46617

*Counsel for Amicus Curiae*

*Of Counsel:*

JOHN CONNAUGHTON
BRIAN J. LINN

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 76-1750

---

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D., and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

---

## MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

The National Center for Law and the Handicapped, Inc., respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for respondents has been obtained. The consents of the attorneys for the petitioners were requested but refused.

The National Center for Law and the Handicapped, Inc., was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the

provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center has been jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. Its sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided directly through legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous cases, serving primarily in the role of *amicus curiae*.

Research activities are broad-based and multi-disciplinary in nature. These activities have enabled the Center to develop a familiarity with the general problems faced by mentally retarded persons in everyday life, as well as with specific problems encountered vis-a-vis proposed sterilization procedures.

This case raises significant issues which will greatly affect the legal rights of handicapped citizens. Historically, handicapped citizens have been especially vulnerable to the use of involuntary sterilization.

As a result of its work and experience, the Center is in a position to present this Court with important and relevant information concerning the historical uses of sterilization and its applicability to the mentally retarded as a group.



In addition, the Center's brief provides information on the condition of mental retardation, clarifying misconceptions and erroneous concepts that still plague those labeled mentally retarded.

Finally, the Center is in a unique position to analyze previous court decisions from a public policy perspective and to analyze the potential impact upon handicapped persons of the case at Bar.

*Amicus* believes this information is relevant to the Court's consideration of this matter. The information presented is, *amicus* believes, of the type neither party will be presenting.

Respectfully submitted,

RONALD M. SOSKIN
Counsel for the National
Center for Law and the
Handicapped, Inc.
1235 North Eddy Street
South Bend, Indiana 46617

## SUBJECT INDEX


| | Page |
|---|---|
| INTEREST OF *AMICUS CURIAE* | 1 |
| QUESTIONS PRESENTED BY *AMICUS* | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 7 |
| I. STERILIZATION IS A DRASTIC, RADICAL AND IRREVERSIBLE PROCEDURE AFFECTING THE FUNDAMENTAL RIGHT TO PROCREATE WHICH IS SUBJECT TO SUCH DANGEROUS ABUSE THAT, ABSENT SPECIFIC STATUTORY AUTHORITY, NO COURT HAS JURISDICTION TO AUTHORIZE IT | 7 |
| A. The History of the Eugenics Movement Illustrates the Dangers Inherent in the Development and Authorization of Involuntary Sterilization | 7 |
| B. The Right of an Individual to Procreate Is a Fundamental Constitutional Right | 14 |
| C. Judges Do Not Have Jurisdiction to Authorize Sterilization Absent the Existence of State Statutes Authorizing Such Action | 17 |
| II. EVEN IF JUDGES HAVE JURISDICTION TO ORDER STERILIZATION FOR MEMBERS OF CERTAIN CLASSES OF PERSONS, THE ALLEGATION THAT A PERSON IS "SOMEWHAT RETARDED" IS INSUFFICIENT TO BRING THE PERSON WITHIN ANY SUCH CLASS | 23 |
| A. Sterilization Procedures Have Only Been Applied to Special Classes of Persons | 23 |

SUBJECT INDEX—Continued


| | Page |
|---|---|
| B. The Label of Mental Retardation Has Little Relationship to the Rationale for Sterilization | 24 |
| C. The Allegation That a Person Is "Somewhat Retarded" Is Insufficient to Bring That Person Within the Ambit of Any Special Class for Whom Sterilization May Be Authorized | 28 |
| III. WHEN A JUDGE'S ACTIONS HAVE TOTALLY ELIMINATED AN INDIVIDUAL'S RIGHT OF APPEAL, JUDICIAL IMMUNITY SHOULD BE ABROGATED | 31 |
| A. Judicial Immunity Should Be Granted Only After a Careful Balancing of Public Policy and Consideration of the Interests of Judges, the Public and Individuals | 32 |
| B. Judicial Immunity Should Not Protect Judge Stump Where His Action Deprived Linda Sparkman of Her One Basic Protection, the Right to Appeal | 38 |
| 1. The Doctrine of Judicial Immunity Rests Significantly Upon the Individual's Right of Appeal | 38 |
| 2. The Total Absence of Procedural Due Process—Including Lack of Notice, Hearing, Counsel, and Notice of Decision—Effectively Deprived Linda Sparkman of the Protection Of Judicial Appeal | 41 |
| C. Public Policy Would Be Well Served by an Affirmance of the Lower Court's Decision | 42 |
| CONCLUSION | 45 |




TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *A.L.* v. *G.R.H.*, 325 N.E.2d 501 (Ind. Ct. App. 1975) | 19, 20 |
| *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872) | 32, 34, 38 |
| *Buck* v. *Bell*, 274 U.S. 200 (1927) | 9, 11, 12, 43, 44 |
| *Diana* v. *California State Board of Education*, C.A. No. C-70 37 RFP (N.D. Cal. February 3, 1970) | 31 |
| *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) | 14, 16 |
| *Floyd* v. *Barker*, 12 Co. Rep. 23 (1608) | 32 |
| *Fray* v. *Blackburn*, 3 Best & Smith 576 (1863) | 33 |
| *Frazier* v. *Levi*, 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969) | 19 |
| *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) | 14, 15 |
| *Hammond* v. *Howell*, 1 Mod. 184, 2 Mod. 218 | 39 |
| *Holmes* v. *Powers*, 439 S.W.2d 579 (Ky. Ct. App. 1969) | 19 |
| *In Interest of M.K.R.*, 515 S.W.2d 467 (Mo. 1974) | 18 |
| *In Re Lambert*, Civ. No. 61156 (Tenn. Prob. Ct. March 1, 1976) | 20 |
| *Larry P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd* 502 F.2d 963 (9th Cir. 1974) | 31 |
| *McAlester* v. *Brown*, 469 F.2d 1280 (5th Cir. 1972) | 41 |
| *North Carolina Association for Retarded Children* v. *North Carolina*, 420 F. Supp. 451 (M.D. N.C. 1976) | 21 |
| *Pierson* v. *Ray*, 386 U.S. 547 (1967) | 33, 34, 35, 36, 38, 39 |
| *Roe* v. *Wade*, 410 U.S. 113 (1973) | 14, 16 |
| *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) | 34, 36, 41 |
| *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) | 13, 14, 15, 44 |
| *Spalding* v. *Vilas*, 161 U.S. 483 (1896) | 35 |
| *State* v. *Feilen*, 126 P. 75 (1912) | 8 |
| *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) | 36, 39 |
| *United States* v. *Nixon*, 418 U.S. 683 (1974) | 37 |
| *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971) | 17, 40 |
| *Wood* v. *Strickland*, 420 U.S. 308 (1975) | 36 |

TABLE OF AUTHORITIES—Continued

Page

*Wyatt* v. *Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1973) ..... 20
*Yates* v. *Lansing*, 5 John. 282 (N.Y. 1810) ..... 39

Statutes:

Fourteenth Amendment ..... *passim*
42 U.S.C. § 1983 ..... 31, 33, 88

Books and Articles:

Begab, "Preface," in Manual on Terminology and Classification in Mental Retardation (1973) ..... 25
Bender, *A Geneticist's Viewpoint Towards Sterilization*, 2 Amicus 45 (September, 1977) ..... 23
Bower, Eugenic Sterilization in Germany and the United States (1973) ..... 12, 13, 14
Brakel & Rock, The Mentally Disabled and the Law (1971) ..... 14
Brown, An Introduction to Eugenics (1935) ..... 7, 9, 10
Brown, "Eugenic Sterilization in the United States," 2380 *The Annals of the American Academy of Political and Social Science* 10 (1930) ..... 10
The Bureau of Analysis and Investigation: Its Purpose and Field, Eugenics and Social Welfare Bulletin #1, State of New York State Board of Charities, Department of State and Alien Poor (1912) ..... 8
Chinn, Drew and Logan, Mental Retardation (1975) ..... 25, 29
Dunn, *Children With Moderate and Severe General Learning Disabilities*, Exceptional Children in the Schools 6 (2nd ed. 1973) ..... 25, 29
Floor, Baxter, Rosen & Zisfein, *A Survey of Marriages Among Previously Institutionalized Retardates*, 13 Mental Retardation 33 (1975) ..... 26
Galton, Hereditary Genius: An Inquiry Into Its Law and Consequences (1870) ..... 11



TABLE OF AUTHORITIES—Continued

Page

Gosney & Popenoe, Sterilization for Human Betterment (1929) ..... 9, 10, 11
Hobbs, The Future of Children (1975) ..... 31
Hogg, Marriages Among Mentally Retarded in a Community Based Program (1974) ..... 27
Humphrey, *The Menace of the Half-Man*, XI J. of Heredity 228 (1920) ..... 9
Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263 (1937) ..... 40
Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson* v. *Ray Reconsidered*, 64 Nw. U. L. Rev. 615 (1970) ..... 40
Kopp, *Eugenics Laws in Europe*, 34 Am. J. Ob. Gyn. 449 (1937) ..... 12
Landman, Human Sterilization (1932) ..... 10
Laughlin, Eugenical Sterilization: 1926 (1925) ..... 10, 23
Leland, *Mental Retardation and Adaptive Behavior*, 6 J. of Spec. Ed. 71 (1972) ..... 30
Linn, *Involuntary Sterilization—A Constitutional Awakening to Fundamental Human Rights*, 2 Amicus 35 (February, 1977) ..... 44
Manual on Terminology and Classification in Mental Retardation (1973) ..... 28, 29
Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services (1977) ..... 24, 29, 30
Mickelson, *Can Mentally Deficient Parents Be Helped To Give Their Children Better Care?*, LIII Amer. J. Of Ment. Def. 516 (1949) ..... 28
Mickelson, *The Feebleminded Parent: A Study of 90 Family Cases*, LI Amer. J. of Ment. Def. 644 (1947) ..... 27
Murdock, *Sterilization of the Mentally Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917 (1974) ..... 25, 26
Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322 (1969) ..... 32, 33, 40
Pickens, Eugenics and Progressives (1968) ..... 7, 8, 9, 11, 12

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Popenoe & Johnson, Applied Eugenics (1933) | 11 |
| Robinson & Robinson, The Mentally Retarded Child: A Psychological Approach (1965) | 8 |
| Roos, *Psychological Impact of Sterilization on the Individual,* Law & Psychology Rev. 45 (Spring, 1975) | 43 |
| Sarison and Doris, Psychological Problems in Mental Deficiency (1969) | 12 |
| Scheerenberger, Deinstitutionalization and Institutional Reform (1976) | 29, 31 |
| Soskin, *Voluntary Sterilization — Safeguarding Freedom of Choice,* 2 Amicus 40 (February, 1977) | 44 |
| Telford & Sawrey, The Exceptional Individual (1972) | 30 |
| Whitney, The Case for Sterilization (1934) | 7, 11 |
| Woodside, Sterilization in North Carolina (1950) | 10 |


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF THE NATIONAL CENTER FOR LAW AND THE HANDICAPPED, INC. AMICUS CURIAE

### INTEREST OF AMICUS CURIAE

The National Center for Law and the Handicapped was established in July, 1972, to advocate for the legal rights of all handicapped individuals through the provision of legal assistance, legal and social science research activities, and programs and processes of education and professional awareness.

The Center has been jointly funded by the Bureau of Education for the Handicapped, Office of Education, and as a project of national significance by the Developmental Disabilities Office, Office of Human Development, of the United States Department of Health, Education, and Welfare. The Center's sponsoring agencies are the National Association for Retarded Citizens, the Family Law Division of the American Bar Association, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County (Indiana).

Assistance for disabled individuals is provided through direct legal intervention in selected cases and indirectly through consultation with attorneys, organizations, and individuals considering or involved in litigation. The Center has been admitted in numerous court cases, serving primarily in the role of *amicus curiae*.

The legal and social science staff also provides assistance to attorneys, legislators and various organizations working in areas involving the disabled through consultation, legal research and the drafting of model pleadings and briefs.

Research activities of the legal and social science staff are broad-based and multi-disciplinary in nature. They have been designed to facilitate legal reform and to allow a fuller realization of the legal rights of the handicapped.

## QUESTIONS PRESENTED BY *AMICUS*

1. Whether, absent specific statutory authority, a court has jurisdiction to authorize sterilization?

2. Whether, assuming judges have jurisdiction to order sterilization for members of certain classes of persons, the allegation that a person is "somewhat retarded" is sufficient to bring the person within any such class?



3. Whether judicial immunity should be abrogated when a judge's actions have totally eliminated an individual's right of appeal?

## STATEMENT OF THE CASE

In 1971 Ora McFarlin presented to Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, a petition asking the court to order the sterilization of her 15 year-old daughter, Linda Sparkman. The petition contained an affidavit by Ora McFarlin stating that Linda was "somewhat retarded" and "has been passed along with other children in her age level" in school. The reason alleged for requesting the court's authorization to proceed with the sterilization was to "prevent unfortunate circumstances."

Judge Stump signed the petition, thus ordering the sterilization. He did not hold a hearing, appoint counsel or a guardian ad litem for Linda Sparkman, nor did he notify her of the petition or his subsequent Order. Because she was totally unaware of Judge's Stump's actions, Linda Sparkman had no opportunity to appeal his Order.

Linda Sparkman was subsequently brought to a hospital and a tubal ligation was performed. She still did not know the true purpose of the hospitalization and was, in fact, informed that the operation was to remove her appendix. Linda Sparkman finally discovered the true nature of the action in 1975, as the result of the difficulties which she and her husband were encounterin their attempts to conceive a child.

Linda Sparkman and her husband subsequently brought a suit in federal court for damages under 42 U.S.C. §§ 1983 and 1985(3) against Judge Stump, the doctors, the hospital and her mother. The complaint charged that Linda Sparkman had been deprived of her constitutional

right to procreate. The suit was dismissed by the United States District Court for the Northern District of Indiana, Fort Wayne Division. The District Court held that the sole basis for state action necessary to provide federal court jurisdiction was the actions of Judge Stump, but that Judge Stump was protected by absolute judicial immunity.

Upon appeal, the Court of Appeals for the Seventh Circuit unanimously reversed the decision, finding that Judge Stump lacked jurisdiction in his actions and therefore, was not entitled to absolute immunity.

## SUMMARY OF ARGUMENT

Sterilization is not an everyday occurrence. It is a drastic procedure which has extreme consequences. Absent specific legislation authorizing sterilization, judges have no jurisdiction to order sterilization for any person.

In Part I of this brief, *amicus* illustrates the history of the eugenics movement which is replete with examples of the abuses which have occurred during the sterilization movement. Genetic and sociological theories, which were never substantiated, led to the passage of numerous sterilization laws and ultimately to the sterilization of countless individuals, most of whom were mentally impaired. The foundation of the movement was ignorance, fear and prejudice.

Paralleling the rise in the social and political acceptance of sterilization in the United States through the early 1930's were developments in Germany. In Germany, as in the United States, sterilization procedures were only applied to those special classes of persons defined by legislation. However, in Germany, these laws were expanded by the judiciary, and they were eventually ignored. Judges gained absolute discretion to order sterilization; the only influence on their decision-making



process was the political thinking of the Third Reich. Sterilization eventually gave way to murder and to the use of concentration camps.

*Amicus* asserts that the right to procreate is a fundamental right which is entitled to substantial constitutional protections. As a safeguard for the right to procreate, *amicus* asserts that, absent specific statutory authorization, a judge does not have authority or jurisdiction to order sterilization.

In Part II of this brief, *amicus* shows that historically sterilization has only been legislatively authorized as to certain specific classes of persons, which have frequently included persons who are mentally retarded. Sterilization laws have been based upon a genetic rationale of preventing "unfit" offspring and a sociological rationale that certain classes of individuals make "unfit" parents.

*Amicus* explores the rationales for the sterilization of mentally retarded individuals and refutes their validity. Genetic factors are linked to only a very small portion of mentally retarded children, and numerous "normal" persons carry "defective" genes which can lead to mental retardation in their offspring. Studies of marriages involving mentally retarded persons illustrate that mentally retarded persons are not necessarily less fit parents than persons who are not mentally retarded.

*Amicus* concludes that, even assuming a judge has jurisdiction to authorize sterilization for a limited and special class, such as the mentally retarded, the mere allegation that a person is "somewhat retarded" is insufficient to justify the inclusion of that person in the class. Mental retardation is a complex condition which is based upon significantly subaverage intellectual functioning and substantial impairment of adaptive behavior. Diagnosis must always be carefully made by experts and cannot be left to lay persons. *Amicus* notes that the

allegation in the original proceeding before Judge Stump, that Linda Sparkman advanced with children of her own age in school, casts substantial doubt on whether she is, in fact, mentally retarded.

In Part III of this brief, *amicus* submits that, even if a judge has jurisdiction to authorize sterilization, the facts of the case at Bar clearly destroy the rationale for clothing Judge Stump with judicial immunity. *Amicus* reads the Court's previous decisions on judicial immunity, and on other official immunities, as traditionally resting upon a balancing of interests among judges, or other public officials, the public and the individual.

*Amicus* asserts that in each case in which immunity has been granted for the protection of judges and the interests of the public, immunity was only granted after a careful balancing of those interests against the available protections afforded the individual through a judicial right to appeal. In each of the Court's earlier cases upholding judicial immunity, the actions of the judge in question, no matter how arbitrary or capricious, were always subject to a review on appeal. Likewise, in each such instance, the individual could be restored to his former condition through the appellate process.

*Amicus* asserts that the case at Bar is distinguishable. Judge Stump's actions were so outrageous as to totally deprive Linda Sparkman of any ability to appeal his judicial fiat. The total lack of procedural due process left Linda Sparkman completely without knowledge of his Order permitting her sterilization and totally without any opportunity to contest or appeal his decision.

*Amicus* argues that, by abrogating her procedural protections, Judge Stump has no basis upon which to claim the normal protections of judicial immunity. The policy considerations which have always been foremost in the mind of the Court mitigate against shielding Judge



Stump from a civil rights action. *Amicus* believes that where, in an isolated and extremely rare and abusive case, a judge's actions have a catastrophic effect upon an individual and where the judge's actions are clearly injurious to the public interest, judicial immunity is an inappropriate defense in an action for damages.

## ARGUMENT

### I. STERILIZATION IS A DRASTIC, RADICAL AND IRREVERSIBLE PROCEDURE AFFECTING THE FUNDAMENTAL RIGHT TO PROCREATE WHICH IS SUBJECT TO SUCH DANGEROUS ABUSE THAT, ABSENT SPECIFIC STATUTORY AUTHORITY, NO COURT HAS JURISDICTION TO AUTHORIZE IT.

#### A. The History of the Eugenics Movement Illustrates the Dangers Inherent in the Development and Authorization of Involuntary Sterilization.

Francis Galton was an Englishman of letters and science who, in the late Nineteenth Century, conceived of eugenics as a social science based on human heredity and Darwinian evolution.[1] The word "eugenics" is from the Greek for "well-born" and for Galton it meant "the study of all the influences under social control which may improve or impair the unborn qualities of future generations of man either physically or mentally."[2] His goal was to encourage the procreation of better offspring who fitted by heredity, would lead successful and constructive lives.[3] As for heredity, he espoused the theory of acquired characteristics.[4]

---

[1] Pickens, Eugenics and Progressives 23, 37 (1968) (hereinafter cited as Pickens).

[2] Whitney, The Case for Sterilization 38 (1934) (hereinafter cited as Whitney).

[3] Brown, An Introduction to Eugenics 19 (1935) (hereinafter cited as Brown).

[4] Pickens, *supra* note 1, at 37.

By 1900, Galton's ideas had spread to the United States.[5] However, his concept of the inheritance of acquired characteristics was rejected by the new American eugenists who, under the guidance of their leader, Charles Davenport, used instead Gregor Mendel's genetic theory of heredity to advance Galton's social philosophy.[6] The program was designed to accomplish dual goals: (1) to improve the race; and (2) to relieve the state of an unnecessary burden by restricting the birth of mental and moral defectives.[7] By 1915 the thesis that hereditary transmission in accord with the Mendelian formula determined mental defects was supported by a growing number of "scientists." [8]

Because American eugenists felt that the prudential check (voluntary family limitation) was prejudicial to the better classes of citizens and the misery check (war and starvation) was not enough to control the transmission of mental defects, an additional solution was advocated—sterilization.[9] Emphasizing social economy, the Chicago Tribune called for the sterilization of defectives and habitual criminals.[10] Another leading proponent of sterilization spoke of the mentally incompetent person as a "half-man" whose major characteristics were "as-

[5] *Id.* at 36.

[6] *Id.* at 50.

[7] The Bureau of Analysis and Investigation: Its Purpose and Field, Eugenics and Social Welfare Bulletin #1, State of New York State Board of Charities, Department of State and Alien Poor 2-3 (1912).

[8] Robinson & Robinson, The Mentally Retarded Child: A Psychological Approach 216 (1965).

[9] Pickens, *supra* note 1, at 28.

[10] *State* v. *Feilen*, 126 P. 75, 77 (1912).



tonishing fecundity" and a general irresponsibility which created increased demands on charity.[11]

Meanwhile, eugenists established an organizational structure for spreading their gospel of sterilization among the American people. Its origins were in the American Breeder's Association which was founded in 1903 by plant and animal breeders who were desirous of keeping in touch with the new science of breeding. This organization soon shifted its focus to mankind, and in 1913 its name was changed to the American Genetic Association.[12]

Considering the biological orientation of both eugenics and sterilization, it was little wonder that they were linked, during the early years of this century, into one movement by tough minded reformers. Davenport, for example, urged that a sterilization program be initiated before the unfit—by means of altruism and sentimental charity—increased and, in time, controlled society.[13] The same concern was raised by Justice Holmes in *Buck* v. *Bell* [14] when he expressed the belief that sterilization was necessary "in order to prevent our being swamped with incompetence." [15]

Sterilizations were performed in a state institution as early as 1899,[16] but it was 1907 before the first state

[11] Humphrey, *The Menace of the Half-Man*, XI J. of Heredity 228-32 (1920).

[12] Brown, *supra* note 3, at 18.

[13] Pickens, *supra* note 1, at 59.

[14] 274 U.S. 200 (1927).

[15] *Id.* at 207.

[16] Gosney & Popenoe, Sterilization for Human Betterment 15 (1929) (hereinafter cited as Gosney & Popenoe).

passed a sterilization law.[17] By January 1, 1933, thirty states had enacted sterilization legislation.[18] While uniformly providing for the sterilization of the mentally ill and mentally retarded, these statutes frequently also included other "undesirables" in the subject groups.[19] Under the authority of these laws, 16,066 persons were reported as having been sterilized by January 1, 1933.[20] Included in this total figure of persons sterilized are 275 men who were castrated and 85 women who had their ovaries removed[21]—despite the fact that both the vasectomy and tubal ligation procedures were known prior to 1900.[22]

One additional aspect of the eugenics-sterilization movement should be recognized—it was explicitly and un-

[17] Landman, Human Sterilization 291 (1932).

[18] Woodside, Sterilization in North Carolina 194 (1950) (hereinafter cited as Woodside). These states were: Alabama, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

[19] Laughlin, Eugenical Sterilization: 1926, at 18-50 (1925) (hereinafter cited as Laughlin). Individuals in the subject groups included: rapists (Indiana, Washington, New Jersey, New York); habitual criminals (Washington, California, New Jersey, Nevada, New York, Oregon, Idaho, Utah); epileptics (Washington, Iowa, Kansas, Wisconsin, Oregon, Montana, Delaware, Virginia, Idaho, Utah); moral degenerates (Washington, Oregon, Idaho); sex perverts (California, Iowa, Oregon, Idaho); life prisoners (California); drunkards (Iowa); drug fiends (Iowa); syphilitics (Iowa); white slavers (Iowa); and, those convicted of a felony involving moral turpitude (Kansas).

[20] Brown, *supra* note 3, at 142-43. By January 1, 1949, the figure increased to 49,207 people. Woodside, *supra* note 18, at 194.

[21] Brown, "Eugenic Sterilization in the United States," 2380 *The Annals of the American Academy of Political and Social Science* 10 (1930); Laughlin, *supra* note 19, at 60.

[22] Gosney & Popenoe, *supra* note 16, at 71, 77-78.



abashedly racist. Galton believed that Blacks were inferior because their ancestral habits had furnished them with inadequate natures.[23] Davenport, the leading eugenist in America, wrote that Blacks were members of a different and elementary species and that race mixing was "socially evil."[24] Paul Popenoe's call for "race purification" was heard in this country even before that cry echoed across Nazi Germany.[25] He believed Blacks to be inferior people and racial intermarriage biologically wrong.[26]

Popenoe also considered Mexicans and Indians to be of a lower intelligence than Whites and urged that all immigrants be carefully screened for "good family stock" and "biological quality."[27] Leon Whitney, the Executive Secretary of the American Eugenics Society, wrote that "the foreign-born furnish in some cases as much as six times as many feeble-minded as natives do."[28] Harry Laughlin, who was on the staff of Davenport's Eugenics Record Office and who served as an expert witness in *Buck* v. *Bell*,[29] felt it was imperative that American women keep the nation's blood pure by not marrying Blacks; in a study commissioned by the federal govern-

[23] Galton, Hereditary Genius: An Inquiry Into Its Law and Consequences 336 (1870).

[24] Davenport, The Presidential Address: The Development of Eugenics 22, cited in Pickens, *supra* note 1, at 56.

[25] Gosney & Popenoe, *supra* note 16, at 131.

[26] Popenoe & Johnson, Applied Eugenics 284-85, 297 (1933). "[T]he more white blood a colored person has, the better is likely to be his rating on an intelligence test." *Id.* at 297.

[27] *Id.* at 283, 291.

[28] Whitney, *supra* note 2, at 147-49 (1934).

[29] Pickens, *supra* note 1, at 65; Whitney, *supra* note 2, at 160.

ment, he also succeeded in tying social degeneracy to the immigration of Southern Europeans.[30]

In 1933, six years after the Supreme Court approved of compulsory sterilization in *Buck* v. *Bell*, Germany passed its first sterilization laws which were to be enforced by Hereditary Health Courts.[31] In both law and science, the United States and Germany almost simultaneously embraced eugenic sterilization. However, at the same time, two different personalities emerged to lead their countries for the next decade, Roosevelt in the United States and Hitler in Germany. By 1937, 225,000 persons had been sterilized by the Nazi regime.[32]

Initially, sterilization statutes in Germany limited sterilization to certain select classes of persons. The jurisdiction of the judiciary was limited to authorizing sterilization only for members of specific classes, which included "the 'feeble-minded,' drug addicted, alcoholic, sex delinquent and those with 'grossly offensive body deformities.'" [33] However, by the late thirties, judges began to apply sterilization to additional classes, in line with the political beliefs of the Third Reich. The original classes expanded to include other groups at judicial whim. Soon those with cleft palates, cleft jaws or harelips and those who were severely hard of hearing came under the judges' jurisdiction.[34] Finally, attempts were made to extend jurisdiction to all those considered "asocial." These attempts failed; instead the "asocial" were sent to concentration camps.[35]

[30] Pickens, *supra* note 1, at 65, 67. This study actually influenced the formulation of immigration law in 1924. *Id.* at 65. *See generally*, Sarason and Doris, Phychological Problems in Mental Deficiency 310-11 (1969).

[31] Pickens, *supra* note 1, 98-99.

[32] Kopp, *Eugenics Laws in Europe*, 34 Am. J. Ob. Gyn. 449 (1937).

[33] Bower, Eugenic Sterilization in Germany and the United States 30 (1973) (hereinafter cited as Bower) (on file in the library of the National Center for Law and the Handicapped, Inc.). The author performed substantial research of German documents and wrote a comprehensive treatise on the growth in popularity of sterilization during the Nazi regime.



One author has described the culmination of the uncontrolled eugenics-sterilization movement in Germany.

> By 1940, even the broadened Nazi laws were ignored. Sterilization for eugenic purposes was no longer used. Rather, between October, 1939 and August, 1941, 3,000 malformed children and 100,000 inmates of public hospitals were put to death. By the summer of 1941, Freisler circulated a proposed law for 'mercy killing.' The law was to be compulsory with respect to the mentally impaired. Hitler pronounced it by executive order.[36]

During the height of the Nazi rampage, our Supreme Court issued its decision in *Skinner* v. *Oklahoma*, 315 U.S. 535 (1942). The Court, in recognizing the fundamental right to procreate, could not have avoided comparing the development of sterilization in the United States with the horrors that ungoverned and unaccountable sterilizations were causing in Germany. Justice Douglas, writing for the Court, stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

*Id.* at 541.

[34] *Id.*

[35] *Id.* at 31.

[36] *Id.*

The United States handled the eugenics movement by the passage of sterilization laws in individual states. Many of these statutes were struck down.[37] Others were narrowly and strictly construed.[38] Many statutes remained on the books only to be completely ignored or rarely used. Control was maintained, and justice prevailed by adherence to the laws.

Meanwhile, Germany passed broader and broader laws in the 1930's. The judiciary continued the expansion of the laws until, finally, the laws were simply ignored.[39] German eugenics, when left in the hands of judges with unaccountable discretion who were influenced only by the political thinking of the Nazi leaders, went out of control, culminating in tragedy. "By 1941, the mentally impaired in Germany were being destroyed, not sterilized." [40] It is a sobering thought that "basically, only a different judicial and political atmosphere distinguished American and German attitudes toward eugenics in the Thirties." [41]

### B. The Right of an Individual to Procreate Is a Fundamental Constitutional Right.

This Court has on numerous occasions recognized that an individual's right to have children, or to choose not to have children, is a fundamental right protected by the Constitution. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

---

[37] Brakel & Rock, The Mentally Disabled and the Law 208 (1971).

[38] *Id.* at 209.

[39] Bower, *supra* note 33, at 36.

[40] *Id.*

[41] *Id.* at 37.



The fundamental nature of the right of procreation was first recognized by this Court in *Skinner* v. *Oklahoma*. In that case, this Court found that an Oklahoma statute which required the involuntary sterilization of convicted larcenists, but not requiring the same for convicted embezzlers, violated the Equal Protection Clause of the Fourteenth Amendment.

Writing for a majority of the Court, Justice Douglas explained why the essential nature of procreation makes it such a fundamental right:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetration of a race—the *right to have offspring*.
>
> . . .
>
> Marriage and *procreation* are *fundamental* to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

316 U.S. at 536, 541 (emphasis added).

More recently, the Court underscored the fundamental nature of the right of procreation in the related contexts of contraception and abortion. In *Griswold* v. *Connecticut*, the Court struck down a Connecticut statute which made it unlawful for married couples to use contraceptives. The focus of the Court's opinion was on the intimacy of the marital relationship itself, holding that it was protected by a "zone of privacy created by several fundamental Constitutional guarantees." 381 U.S. at 485. In writing the opinion of the Court, Justice Douglas referred to

the First, Third, Fourth, Fifth and Ninth Amendments as sources of these "fundamental Constitutional guarantees," and then concluded that the right involved is "a right of privacy older than the Bill of Rights." *Id.* at 486.

Seven years later, in *Eisenstadt* v. *Baird*, the Court made it clear that the right of privacy, which protects the fundamental decision whether or not to have children, is not limited to the marital relationship. A Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons was held to violate the Equal Protection Clause of the Fourteenth Amendment. Speaking for the Court, Justice Brennan addressed the emphasis which the *Griswold* Court placed on the marital relationship and expressly rejected the notion that the right of privacy is honored only in that relationship:

> If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so *fundamentally affecting a person as the decision whether to bear or beget a child.*

405 U.S. at 453 (emphasis added).

Finally, in its landmark decision in *Roe* v. *Wade*, the Court determined that the right of privacy was broad enough to encompass a woman's decision to terminate her pregnancy. The Court, in an opinion by Justice Blackmun, held that a Texas statute imposing a criminal penalty for abortion violated the Due Process Clause of the Fourteenth Amendment. In discussing the rights which are protected by the zone of privacy, the Court made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." 410 U.S. at 152. The Court goes on to list procreation as one of those activities to which the protection of the right of personal privacy attaches.



The sterilization procedure authorized for Linda Sparkman irreversibly infringed upon her right "to bear or beget a child." *Amicus* asserts that the right to be free from involuntary sterilization is no less fundamental than the right to use contraceptives or to seek an abortion. Judge Stump's Order, which completely foreclosed any opportunity for Linda Sparkman to exercise her fundamental right, must be strictly scrutinized by this Court.

### C. Judges Do Not Have Jurisdiction to Authorize Sterilization Absent the Existence of State Statutes Authorizing Such Action.

Several courts have considered the question of a judge's jurisdiction to authorize sterilization. These courts have repeatedly found that, unless a statute specifically authorizes the procedure, judges have no jurisdiction to order sterilization.

The leading case involved a state probate court judge who authorized the sterilization of a mentally retarded girl and who was subsequently sued for his action. *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971). The judge moved to dismiss the action based upon judicial immunity. However, the district court held that sterilization was outside the scope of his jurisdiction.

> There is no statute in Ohio which authorizes a judge to order sterilization for any purpose. Nor has this court been able to discover any judicial precedent for such an order in the absence of a specific statute.

*Id.* at 673-74.

The court asserted that jurisdiction to order sterilization procedures must emanate from a specific legislative enactment. Recognizing that the Ohio legislature had refused to enact laws to authorize sterilization, the

*Wade* court held that judicial immunity could not shield the probate judge from liability.[42]

The Supreme Court of Missouri has reversed a lower court decision authorizing the sterilization of a mentally retarded girl. *In Interest of M.K.R.*, 515 S.W.2d 456 (Mo. 1974). The Court considered the applicable jurisdictional statutes and concluded that:

> [T]he provisions of one of the sections of the juvenile code referred to by petitioner confer on the juvenile court the jurisdiction and power to order or authorize the sterilization of a child. And we find no section of the code which does. Nor for that matter do we find any constitutional or statutory provision empowering any court in this state to order the involuntary sterilization of any person.

*Id.* at 470.

Recognizing the fundamental nature of the Constitutional right involved, the court distinguished sterilization from other routine or emergency surgical procedures.

> The courts are not faced in this case with a prayer for a judgment authorizing ordinary medical treatment, or radical surgery necessary to preserve the life of a child; we are faced with a request for sanction by the state of what no doubt is a routine operation which would irreversibly deny to a human being a fundamental right, the right to bear or beget a child. Jurisdiction of the juvenile court to exercise the awesome power of denying that right may not be inferred from the general language of the sections of the code to which we have referred. Such jurisdiction may be conferred only by specific statute.
>
> Whatever might be the merits of permanently depriving this child of this right, the juvenile court may not do so without statutory authority—authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people.

*Id.* at 470-71.

In *Frazier* v. *Levi*, 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969), the court refused to authorize the sterilization of a mentally retarded woman which was requested by her guardian for social and economic reasons. In this case of first impression in Texas, the court concluded that jurisdiction to authorize sterilization had not been granted to the court by any provision of the Texas Constitution or by any statute. Similarly, in *Holmes* v. *Powers*, 439 S.W.2d 579 (Ky. Ct. App. 1969), the court concluded that neither statute nor common law granted jurisdiction to sterilize a mentally retarded woman.

When the Indiana Court of Appeals faced this issue, the court concluded:

> We believe the common law does not invest parents with such power over their children even though they seriously believe the child's adulthood would benefit therefrom.

*A.L.* v. *G.R.H.*, 325 N.E.2d 501, 502 (Ind. Ct. App. 1975). Thus the Indiana court concluded that it had no authority to authorize sterilization. The court, in reaching its decision, considered two factors:

> [First,] we are not dealing with a legislative enactment permitting sterilizations without consent where certain conditions exist.

---

[42] The court also noted that the operation was performed before the expiration date for an appeal; however it did not reach any issue arising from that fact in light of its decision on the lack of the judge's jurisdiction. 337 F. Supp. at 674. For a further discussion of the effect of the lack of a right to appeal, *see* Part III, *infra*.

> Secondly, the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.

*Id.*

*A.L.* v. *G.R.H.* was relied upon by the court in *In Re Lambert*, Civ. No. 61156 (Tenn. Prob. Ct. March 1, 1976). There, a Tennessee statute permitted sterilization with the consent of the person to be sterilized. However, no legislation existed to authorize sterilization for persons who were incompetent to give consent to the procedure. The court concluded that it did not "have the jurisdiction or authority to empower the petitioner [the mother] to have the operation here requested." Slip op. at 8.

Even in states which have legislatively permitted sterilization, the courts which have construed the statutes have taken care to insure that the fundamental rights of individuals subjected to the reach of the statutes have been afforded appropriate protections against abuse. In *Wyatt* v. *Aderholt*, 368 F. Supp. 1382 (M.D. Ala 1973) (per curiam), a three-judge panel declared Alabama's sterilization statute unconstitutional. In a companion opinion, Judge Frank Johnson issued strict guidelines to control proposals to sterilize institutionalized mentally retarded persons. *Wyatt* v. *Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974). These included the prohibition of sterilization for those under 21, except in medical emergencies, and the requirement of personal informed consent for those over 21. To protect mentally retarded individuals from the abuses of the sterilization process which had previously existed in the Alabama institutions, *Wyatt* ordered that sterilizations only occur after a



review committee finds both that the individual has a genuine, uncoerced desire to be sterilized and that the procedure is in the person's best interest. Even where sterilization is authorized by the committee, it is still subject to court review.

The most recent judicial scrutiny of an involuntary sterilization statute occurred in *North Carolina Association for Retarded Children* v. *North Carolina*, 420 F. Supp. 451 (M.D. N.C. 1976). While the three-judge federal court upheld most of the North Carolina statute, it did so by requiring that very stringent standards and procedures be adhered to. The court's standards mandate a finding that the best interest of the mentally retarded person or society will be served and a finding that the mentally retarded person is likely to engage in sexual activity without the use of contraceptive devices. It must then be shown that the individual in question either is likely to procreate a "defective" child or is likely to be unable to care for a child. The procedural safeguards assured in *North Carolina Association for Retarded Children* include: the right to counsel, including court-appointed counsel in the case of indigency; involvement of a parent, guardian or guardian ad litem; the right to sufficient notice of the hearing for the mentally retarded person and his or her natural or legal guardian; the right to present evidence; and, the right to cross-examine adverse witnesses. A right of appeal to the superior court for a trial de novo before a jury is explicitly provided for, as well as the right to pursue further appeals.

The necessity for the strict statutory safeguards assured by the North Carolina court's decision is underscored by a specific finding of fact of the three-judge federal court.

> Most competent geneticists now reject social Darwinism and doubt the premise implicit in Mr. Justice Holmes' incantation that ". . . three genera-

> tions of imbeciles is enough." . . . We think it is a fair statement, from the expert testimony we have heard and read, to say that the best opinion presently is that rarely would a competent doctor recommend involuntary sterilization—but that he might do so in an extreme case. . . . In short, the medical and genetical experts are no longer sold on sterilization either to benefit retarded patients or the future of the Republic.

*Id.* at 454.

The line of cases holding that judges, absent a specific statutory authorization, do not have the jurisdiction to order the sterilization of any individual and the cases which narrowly construe statutory enactments providing for the involuntary sterilization of individuals have, as a common bond, the goal of minimizing the use of sterilization procedures. This goal reflects the recognition by these courts that the right to procreate is a fundamental right which requires substantial judicial protection to ensure that abuses of the sterilization process do not occur. *Amicus* asserts that, in the case at Bar, the actions of Judge Stump ignored the procedural and substantive rights of Linda Sparkman, disregarded the medical and genetic experts, and invaded the province of the legislature in such a manner that Judge Stump imposed his own biases upon Linda Sparkman in a drastic and irreversible manner. *Amicus* asserts that, in so doing, Judge Stump acted without jurisdiction and that judicial immunity is, therefore, not available to him as a defense in an action for damages.



## II. EVEN IF JUDGES HAVE JURISDICTION TO ORDER STERILIZATION FOR MEMBERS OF CERTAIN CLASSES OF PERSONS, THE ALLEGATION THAT A PERSON IS "SOMEWHAT RETARDED" IS INSUFFICIENT TO BRING THE PERSON WITHIN ANY SUCH CLASS.

### A. Sterilization Procedures Have Only Been Applied to Special Classes of Persons.

Throughout history, only certain classes of persons have been singled out to be subject to involuntary sterilization. The rationale for the sterilization of members of such classes has been based upon two premises: the genetic argument that "unfit" individuals should be restrained from reproducing their own kind; and the sociological argument that the "unfit" could not be satisfactory parents.[43]

Sterilization laws have primarily focused upon three classes of individuals: mentally retarded individuals (usually mildly or moderately retarded individuals); mentally ill individuals (usually severely impaired); and individuals with epilepsy (anyone with a seizure disorder).[44] Statutes have also extended beyond these groups to include rapists, habitual criminals, moral degenerates, sex perverts, drunkards, drug fiends, syphilitics, white slavers, and individuals convicted of a felony involving moral turpitude.[45]

*Amicus* asserts that, even if Judge Stump had jurisdiction to order sterilization in some instances, those instances can only be narrowly drawn to correspond with historical practice. For this Court to hold that a judge's

---

[43] Bender, *A Geneticist's Viewpoint Towards Sterilization*, 2 Amicus 45, 46 (September, 1977).

[44] *Id.*

[45] Laughlin, Eugenical Sterilization: 1926, at 18-50 (1925).

jurisdiction is not narrowly drawn, this Court would, by necessity, be holding that judges have the general jurisdiction to order sterilization for any individual at any time.

### B. The Label of Mental Retardation Has Little Relationship to the Rationale for Sterilization.

Mental retardation is a concept which is widely misunderstood by the general public. Traditionally and, unfortunately even today, to many persons the term connotes an organic condition that is markedly abnormal, irreversible and unchanging. Such despairing negativism can be traced to the previous decades when concepts about mental retardation were considered to be scientifically founded.[46] Such stereotypical notions are now giving way to the increasing acceptance of the developmental model which is premised upon the finding that all persons, including individuals with mental retardation, are capable of continuing growth and development.[47]

As more knowledge has been gained, society has become less assured about mental retardation. As the disciplines of medicine and the social and behavioral sciences increase in their knowledge of the complexities of mental

---

[46] *See* Discussion Part IA, *supra*.

[47] Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 70-71 (1977). Dr. Menolascino describes the developmental model as follows:

> In contrast to the image of the retardate as a sick person, use of the developmental model brings about habilitation of the mentally retarded through the application of positive programmatic principles. The developmental model is a means of bringing about normalization . . . and can be viewed as taking a positive view of the modifiability of human behavior. Further, all mentally retarded persons are perceived as capable of growth, development, and learning, as opposed to the old concept of negative reinforcement of difference from the norm.



retardation, "the less confident we become about our ability to classify individuals [as mentally retarded]." [48]

Despite the fact that the sterilization of mentally retarded individuals is still viewed by some as a means of preventing mental retardation, authorities in the area of mental retardation acknowledge that the causes of mental retardation vary widely. The current beliefs of these experts are that only a very small percentage, perhaps as low as six percent, of mental retardation is an inherited condition, and that for the vast majority of cases a definitive etiology is unknown.[49]

Basically, three different generic causes have been identified: purely genetic, genetic and environmental, and purely environmental.[50] Psycho-social (*e.g.*, cultural-familial) retardation is represented most frequently in the mildly retarded levels and may account for as much as 85 percent of mental retardation.[51] Mental retardation which results from environmental factors, such as trauma or impoverished intellectual or emotional environments, clearly cannot be controlled through sterilization. Some "defects" which are genetically caused can only lead to mental retardation when certain environmental factors such as diet are not controlled.[52] Other means are thus available to prevent this type of mental retardation. Finally,

---

[48] Begab, "Preface," in Manual on Terminology and Classification in Mental Retardation ix (1973).

[49] Dunn, *Children With Moderate and Severe General Learning Disabilities*, Exceptional Children in the Schools 6 (2nd ed. 1973) (hereinafter cited as Dunn).

[50] Murdock, *Sterilization of the Mentally Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917, 924 (1974) (hereinafter cited as Murdock).

[51] Chinn, Drew and Logan, Mental Retardation 12 (1975) (hereinafter cited as Chinn).

[52] Murdock, *supra* note 50, at 925.

> even retardation resulting solely from inheritance of defective genes cannot be greatly reduced by sterilizing only the retarded, for eighty to ninety percent of retarded offspring are born to normal parents.[53]

If the genetic goals for sterilization were to prevail, sterilization would have to be strictly required for the broad class of persons, both mentally retarded and "normal," who carry and transmit "defective" genes. The class to be sterilized would only include a small percentage of the mentally retarded population, since only a small percentage of that group carry and transmit "defective" genes. No society has yet, even through legislation, attempted to achieve the genetic goal by extending sterilization to broad classes of "normal" persons.

The second rationale for sterilization has been the sociological argument concerning fitness for parenthood. The validity of this rationale as it applies to the mentally retarded as a class has also been challenged by sociological studies.

In a recent survey of the marital status of eighty previously institutionalized mentally retarded persons, the conclusion reached was that "there is no apparent reason, at this state of the study, to prevent any once institutionalized retardates from taking on the responsibilities of marriage and parenthood."[54] This report, while citing the need for future research to assess the long-term status of such marriages, concludes that, even in marriages involving persons institutionalized for more than twenty years, the marriages entered into between mentally retarded persons do not differ substantially in its strengths and weaknesses from marriages entered into between "normal" persons.

---

[53] *Id.* at 926.

[54] Floor, Baxter, Rosen & Zisfein, *A Survey of Marriages Among Previously Institutional Retardates*, 13 Mental Retardation 33, 37 (1975).



In a paper prepared in 1974 for presentation at the Region VII Workshop on Family Life Education and Family Planning for the Mentally Retarded, Genevieve Hogg reports on the status of fifteen marriages in which one or both of the spouses had been identified as mentally retarded.[55] In her paper, Hogg provides considerable insight into the everyday life of these marriages and reaches the conclusion that these marriages

> do not support the myth that mentally retarded parents cannot meet the physical and emotional needs of a child throughout the developmental years.[56]

These findings are not dissimilar to the early indications of the work of Phyllis Mickelson.[57] In her study of ninety families in which one or both parents had been adjudged mentally deficient, she concluded that the parents' mental deficiency did not appear to be the sole determinate of the adequacy of child care. The five major factors in determining the adequacy of the parents' care which were concluded to be the most important factors were: the mental health of the parents (especially that of the mother); the degree of harmony between the husband and the wife; the number of pregnancies; the number of children in the home; and, the adequacy of income.[58] Thus, the factors which significantly influenced the "fitness" of mentally retarded parents were the same factors which influence the "fitness" of all parents, including "normal" parents.

In the conclusion of her study two years later, Mickelson's basic finding remained that mental deficiency is

---

[55] Hogg, Marriages Among Mentally Retarded in a Community Based Program (1974) (unpublished) (on file in the library of the National Center for Law and the Handicapped).

[56] *Id.* at 5.

[57] Mickelson, *The Feebleminded Parent: A Study of 90 Family Cases*, LI Amer. J. of Ment. Def. 644 (1947).

[58] *Id.* at 653.

not a primary factor in influencing the adequacy of mentally retarded parents.[59] She concludes that "the mentally deficient parent emerges from this study not as a different kind of parent but as a more vulnerable one." [60]

### C. The Allegation That a Person Is "Somewhat Retarded" Is Insufficient to Bring That Person Within the Ambit of Any Special Class for Whom Sterilization May Be Authorized.

Even if this Court holds that jurisdiction existed in Judge Stump's court under which he could order sterilization for certain special classes, *amicus* submits that the mere allegation that Linda Sparkman was "somewhat retarded" is not sufficient to invoke that jurisdiction as to her.

The most widely accepted definition of mental retardation is that adopted by the American Association on Mental Deficiency.

> Mental Retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.[61]

The Association, acknowledging an increased awareness of the social abilities of persons with lower intelligence, has deleted the category of "borderline retardation" [62] because of the understanding that mental retardation refers to a *significantly* subaverage general intellectual functioning. Such significantly lower level of intellectual

[59] Mickelson, *Can Mentally Deficient Parents Be Helped To Give Their Children Better Care?*, LIII Amer. J. of Ment. Def. 516 (1949).

[60] *Id.* at 532.

[61] Manual on Terminology and Classification in Mental Retardation 5, 11 (1973) (hereinafter cited as Manual).

[62] *Id.*



functioning must be accompanied by behavior that is maladaptive. Following these criteria, the label of mental retardation cannot be applied to those persons who are present in any society and who are simply of a somewhat lower, or "borderline," intelligence. "Intellectual functioning" cannot be estimated, but must be determined by specific types of psychometric assessment.[63] When the label of mental retardation is applied in the absence of such testing, it must be seriously questioned.

With regard to adaptive behavior, there are no generalized behaviors that are specific to mental retardation.[64] Adaptive behavior includes such aspects as self-help skills, personal grooming, communication skills, socialization, personal responsibility, and self-direction.[65] At the school-age level in particular, adaptive behavior also relates to the achievement of success in school or to the maintenance of normal educational progress.[66] Deficits in adaptive behavior refer to difficulties in carrying out tasks, or attaining achievements, which are appropriate to one's chronological age.[67]

Final judgments regarding adaptive behavior can be determined only after consideration of the varied factors which are brought to bear upon the development of the behavior. Assessments of the level of adaptive behavior must be made at fairly frequent intervals because a

[63] *Id.* at 15-16; Chinn, *supra* note 51, at 21; Dunn, *supra* note 49, at 65-66.

[64] Scheerenberger, Deinstitutionalization and Institutional Reform 11 (1976); *see also* Leland, *Mental Retardation and Adaptive Behavior*, 6 J. of Spec. Ed. 71, 76 (1972).

[65] Manual, *supra* note 61, at 12.

[66] Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 17-18 (1977) (hereinafter cited as Menolascino).

[67] Manual, *supra* note 61, at 11; Chinn, *supra* note 51, at 21; Dunn, *supra* note 49, at 66.

higher level of adaption can be attained through changes in the environment, training, or the natural development of skills.[68] One author has cautioned that viewing behavior as static and irreversible can "lead to drastic proposals concerning euthanasia, forced sterilization or other extreme recourses based on the assumption that the problems can be neither corrected nor modified." [69]

Careful study, use of varied tests, and repeated observation—all carried out by persons trained in relevant disciplines—must be involved prior to the application of the complex label of mental retardation. The assessment process "goes on informally and haphazardly when done by relatives, friends, and acquaintances," [70] and thus an accurate diagnosis of mental retardation cannot occur.

The allegations in the petition presented to Judge Stump were that Linda Sparkman was "somewhat retarded" but that she "attended public school . . . and has passed along with other children in her age level." *Amicus* asserts that it is most unlikely that a child who has progressed through a public school system at the same rate of progress as her age-related peers would demonstrate either an "intellectual functioning" which is *significantly* subaverage or "deficits in adaptive behavior." *Amicus* submits that the factual allegations contained in the petition presented to Judge Stump are, therefore, inadequate to support an ultimate finding that she is mentally retarded.

Additionally, *amicus* asserts that the allegation "somewhat retarded" [71] is totally insufficient to place an indi-

[68] Menolascino, *supra* note 66, at 70-75; Chinn, *supra* note 51, at 21.

[69] Leland, *Mental Retardation and Adaptive Behavior*, 6 J. of Spec. Ed. 71, 77 (1972).

[70] Telford & Sawrey, The Exceptional Individual 186 (1972).

[71] Since no allegation was made that Linda Sparkman fell in the class of "mildly retarded" persons, this Court need not face the



vidual within the ambit of any special class for whom sterilization has traditionally been authorized. A decision by this Court to the effect that Judge Stump had jurisdiction to order Linda Sparkman's sterilization would be a holding that any judge, under the exercise of similar jurisdiction, could order the sterilization of any individual.

## III. WHEN A JUDGE'S ACTIONS HAVE TOTALLY ELIMINATED AN INDIVIDUAL'S RIGHT OF APPEAL, JUDICIAL IMMUNITY SHOULD BE ABROGATED.

*Amicus* asserts that the policy considerations which normally call for judicial immunity under 42 U.S.C.

question whether such a label would be sufficient to bring a person within a class authorized for sterilization. It is, however, relevant that even the more specific label of "mildly retarded," although much more meaningful than "somewhat retarded," is open to serious scrutiny.

> It is also in the mildly retarded range that one finds the largest number of individuals for whom the diagnosis of mental retardation is uncertain.

Hobbs, The Future of Children 52 (1975).

Similarly,

> [a] child with an IQ score within the mild range of mental retardation who is from a low-socio-economic-status group is more likely to be diagnosed mentally retarded than a middle-or-upper-class child with a similar score.

*Id.* at 29-30. *See also*, The President's Committee on Mental Retardation, Findings (1968), cited in Scheerenberger, Deinstitutionalization and Institutional Reform 15 (1976).

Litigation has also addressed this problem. The court in *Larry P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd* 502 F.2d 963 (9th Cir. 1974), found that IQ tests were culturally biased, thereby causing Black children to be disproportionately labeled as retarded and placed in special education classes. *See also, Diana* v. *California State Board of Education*, C.A. No. C-70 37 RFP (N.D. Cal. February 3, 1970), concerning culturally and linguistically biased IQ-testing, resulting in over-diagnosis of Mexican-American children as mentally retarded.

§ 1983 do not justify the application of judicial immunity in the case at Bar. *Amicus* asserts that the total absence of procedural due process in Judge Stump's court and the lack of an opportunity for Linda Sparkman to appeal the judge's order permitting her sterilization distinguish this case from previous decisions of this Court. Thus, *amicus* argues that the public policy calls for the removal of the shield of judicial immunity under the narrow facts presented in this case.

**A. Judicial Immunity Should Be Granted Only After a Careful Balancing of Public Policy and Consideration of the Interests of Judges, the Public, and Individuals.**

The doctrine of judicial immunity [72] is a doctrine well-founded in English law, as well as in American law. *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872). The doctrine dates "back at least to 1608, and is entirely judge-made." [73]

In *Bradley* v. *Fisher*, the first Supreme Court case to enunciate the doctrine of absolute judicial immunity, the Court reviewed prior English law and analyzed the competing interests involved. In considering the interests of judges, the Court acknowledged that judicial actions were complex and that litigation often excited the emotions of the participants. "[I]f a judge could be compelled to answer in a civil action for his judicial acts . . . his office [would] be degraded and his usefulness destroyed." 13 Wall. at 349, 20 L. Ed. at 650. The Court also recognized that absent judicial immunity a judge

[72] *Amicus* has briefed only those portions of cases dealing with personal liability for damages and has not addressed discussions of injunctive relief.

[73] Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322, 323 (1969) (hereinafter cited as Note). The author cites *Floyd* v. *Barker*, 12 Co. Rep. 23 (1608), as an early case.



could be placed in the untenable situation of defending his judicial integrity in every case, noting that the losing party would invariably attack his decision.

From the public's perspective, the Court concluded that "the protection essential to judicial independence would be entirely swept away." 13 Wall. at 348, 20 L. Ed. at 650. The public has long had an interest in maintaining an independent judiciary which can act without fear of coercion or reprisal.

> The public are deeply interested in [judicial immunity], which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them from being harassed by vexatious actions.

13 Wall. at 349, 20 L. Ed. at 650, citing *Fray* v. *Blackburn*, 3 Best & Smith 576 (1863).

In completing the tripartite analysis, the Supreme Court considered the interests of the individual who sought to bring the action. The Court concluded that the individual was not entirely at the mercy of a judge:

> Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort.

13 Wall. at 354, 20 L. Ed. at 650.

Subsequent to the passage of 42 U.S.C. § 1983, courts differed as to the effect of judicial immunity on this statute.[74] In 1967, the Supreme Court held for the first time that the doctrine of absolute judicial immunity would be applied to actions under that statute. *Pierson* v. *Ray*, 386 U.S. 547 (1967).

[74] *See Pierson* v. *Ray*, 386 U.S. 547, 550 (1967); Note, *supra* note 73, at 324.

In *Pierson* the Court based its decision upon the following policy analysis:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

*Id.* at 554.

Thus, almost one hundred years after *Bradley* v. *Fisher*, the Supreme Court still sought to balance the competing interests: the judge's interest in avoiding situations whereby losing parties challenge his integrity through potentially vexatious litigation; the public's interest in maintaining an independent, uncoerced judiciary; and, the individual's interest in correcting errors. In weighing the various interests, the Court relied upon the fact that the individual could redress error through the appeal process.

The Court has adhered to the same method for balancing the three interests in its cases dealing with other official immunities. In *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), the Court of Appeals for the Sixth Circuit had upheld the dismissal of an action filed against members of the state executive branch of Ohio, including the Governor. The Sixth Circuit had relied upon a concept of absolute immunity for protecting those officials from personal liability. The Supreme Court, in reversing the Sixth Circuit, discussed the policy behind the doctrine of immunity and concluded that only a qualified immunity existed.



The Court began its analysis by recognizing that

> it is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public.

*Id.* at 241.

The Court then compared the responsibilities of various public officials:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes that it is better to risk some error and possible injury from such error than not to decide or act at all.

*Id.* at 241-42.

High executive officers were then compared with police officers and judges. The Court recognized that police officers have never possessed absolute immunity for their actions, citing *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967). On the other hand, citing an early Supreme Court decision, *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896), the Court recognized that

> the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed

> upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.

416 U.S. at 246 n. 8.

While granting high executive officials a broader immunity than police officers and other public officials with less responsibility, the Supreme Court refused to grant absolute immunity since this would upset the balance of interests at the expense of the individual.

> [S]ection 1983 would be drained of meaning were we to hold the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.'

*Id.* at 248.

In its next term, the Court refused to extend absolute immunity to school board officials. *Wood* v. *Strickland*, 420 U.S. 308 (1975). In reaching its decision, the Court once again weighed the competing interests and the effect of its action:

> But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.
>
> *Tenney* v. *Brandhove*, *Pierson* v. *Ray*, and *Scheuer* v. *Rhodes* draw upon a very similar judgment in construing § 1983.

*Id.* at 320-21.

Thus the policy considerations enunciated by the Supreme Court in its decisions involving judicial immunity have recently been applied to situations involving other officials. The trend of decisons by this Court should not



place judges in a position of absolute immunity while other officials, including Governors and even Presidents,[75]

---

[75] In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Supreme Court refused to uphold a claim by the President of the United States that tape recordings and documents relating to his conversations with aides and advisers were protected by absolute executive privilege. A key argument by the President involved the effect withdrawing executive privilege would have on the performance of his aides and advisers and on his decision-making process, arguing that the privilege was consistent with the public interest. The Court unanimously rejected this argument and Chief Justice Burger, writing for the Court, explained the Court's reasoning.

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added, to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of a Government and inextricably rooted in the separation of powers under the Constitution.

*Id.* at 708.

After stating the interests of the President and the public, the Court weighed the interests of the individual:

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law.

*Id.*

As the Court held, the privilege afforded the President is not absolute and must give way to countervailing policy arguments.

> [The Court] must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice . . . . [T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.

*Id.* at 711-13.

are not so protected. *Amicus* asserts that the public policy must be fully considered in this case, as it has been in others.

### B. Judicial Immunity Should Not Protect Judge Stump Where His Actions Deprived Linda Sparkman of Her One Basic Protection, the Right to Appeal.

1. *The Doctrine of Judicial Immunity Rests Significantly Upon the Individual's Rights of Appeal.* In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court held the doctrine of judicial immunity applicable to actions brought against judges under 42 U.S.C. § 1983. However, the Court upheld immunity only after a careful balancing of the competing interests. With regard to the interests of the individual litigant, the Court succinctly stated:

> [A judge's] errors may be *corrected on appeal*, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

*Id.* at 554 (emphasis added).

The Court perceived that a litigant, unsatisfied with a judge's decision, could attempt to overturn that decision on appeal. The Court found the right to appeal to be ample protection for the individual, negating any need for abrogating judicial immunity in a civil action.

In *Pierson*, the Court followed its earlier decision in *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646 (1872). There, the Court recognized that an individual's proper recourse was through the process of appeal.

> Against the consequence of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to these remedies, they must, in such cases, resort.

13 Wall. at 354, 20 L. Ed. at 646.



The rationale for permitting judicial immunity because of the existence of appeal rights dates back to the origins of the doctrine itself in English common law. In *Yates* v. *Lansing*, 5 John. 282 (N.Y. 1810), the court summarized the English tradition of supporting judicial immunity, citing the early English case of *Hammond* v. *Howell*, 1 Mod. 184, 2 Mod. 218.

> [T]hat though the defendant acted erroneously, he acted judicially, and if what he did was corrupt, complaint might be made to the king, and if erroneous, it might be reversed.

5 John. at 294.

As a forerunner to its decision upholding judicial immunity in *Pierson* v. *Ray*, the Court, in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), held that 42 U.S.C. § 1983 did not abrogate the official immunity of legislators. In his detailed analysis of the decision, Justice Black explained the holding of the case:

> It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators. That is to say, the holding that the chairman and other members of the Committee cannot be sued in this case is not a holding that their alleged persecution of Brandhove is legal conduct. Indeed, as I understand the decision, there is still much room for challenge to the Committee action. Thus, for example, in any proceeding instituted by the Tenney Committee to fine or imprison Brandhove on perjury, contempt or other charges, he would certainly be able to defend himself on the ground that the resolution creating the Committee or the Committee's actions under it were unconstitutional and void.

*Id.* at 379-80 (Black, J., concurring).

Thus, in *Tenney* the Court, while upholding immunity, weighed the public policy considerations to insure that

the individual was not totally without other opportunities for redress. The right to challenge the action before another body is, thus, an integral part of the rationale supporting the doctrine of immunity.

Several commentators who have examined the doctrine of absolute judiciary immunity have recognized that the right to appeal is an essential element of its justification.[76] Numerous courts,[77] including this

---

[76] While criticizing the doctrine on the basis that the right to appeal is not a sufficient protection for the individual, these authors make clear that the right to appeal is implicit in a finding of immunity. Thus, one author concludes:

> Doubtless such judgments are 'reviewable' on appeal. But appellate review may be long-delayed and costly beyond the means of many litigants.

Kates, Jr., *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson* v. *Ray Reconsidered*, 65 Nw. U. L. Rev. 615, 629 n. 43 (1970).

Similarly, a second author concludes:

> An individual or group facing litigation which is intended only to harass will take little comfort indeed from his 'right' to appeal. Whether or not the appeal vindicates the abused party, the inconvenience and expense of litigation remains.

Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L. J. 322, 330 (1969).

An early analysis of judicial immunity also acknowledged that the traditional justification for granting judicial immunity rests upon the availability of alternative means of redress.

> The existence of adequate opportunities for change of venue, new trial, or reversal on account of prejudice or error, thereby minimizes the need, as against judges not of last resort, of an additional tort liability.

Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 272 (1937).

[77] Through the use of the LEXIS computer system, *amicus* has located 412 federal cases since 1935 dealing with judicial immunity. With the exception of the case at Bar and *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), where the judge was also held liable, no other case has a similar factual situation. The case



Court,[78] in considering the issue of official immunity have followed the Court's reliance in *Pierson* upon the existence of a right of appeal as the foundation for the doctrine. For example, the Court of Appeals for the Fifth Circuit, while upholding absolute judicial immunity, reasoned,

> [We] are mortified by the spectre of deprivations of the civil rights of our citizenry. But when the infringement comes at the hands of a judge, our system offers its own built-in corrective—the improprieties of judges may be attacked and *appealed from*, either directly or collaterally.

*McAlester* v. *Brown*, 469 F.2d 1280, 1283 (5th Cir. 1972) (emphasis added).

Thus, whether the doctrine of absolute judicial immunity is being supported or attacked, each court and each author accepts the basic inherent safeguard provided by our judicial system, the right to appeal. *Amicus* argues that where that right to judicial review does not exist, the policy reasons for upholding immunity fall.

2. *The Total Absence of Procedural Due Process—Including Lack of Notice, Hearing, Counsel, and Notice of Decision—Effectively Deprived Linda Sparkman of the Protection of Judicial Appeal.* Judge Stump authorized a tubal ligation on Linda Sparkman by signing the petition presented to him by Ora McFarlin, her mother. Based upon the petition, the hospital and doctors performed the irreversible operation.

Linda Sparkman was not served notice of the proposed action against her, even though the result would be to deprive her of her fundamental right to procreate.

---

at Bar is even more narrow than *Wade* in that it is the only case in which the actions of a judge clearly abrogated the right to appeal.

[78] *Scheuer* v. *Rhodes*, 416 U.S. 232, 244 (1974).

Neither counsel nor a guardian ad litem was appointed to represent Linda Sparkman's interests, despite the fact that she was a minor and allegedly "somewhat retarded." Judge Stump did not hold a hearing by which he could determine whether any justification existed for the drastic procedure. After Judge Stump signed the petition, he made no attempt to serve Linda Sparkman with notice of his Order; in fact, no official court file was even opened.

As a result Linda Sparkman was totally unaware of what had transpired between her mother and Judge Stump. She was totally unaware that she was to undergo tubal ligation. She was totally unaware that she would subsequently be unable to bear children. And, being unaware of all this, Linda Sparkman was unable to rely upon her judicial right of appeal. She was afforded no opportunity whatsoever to raise any objections to Judge Stump's action.

As result of Judge Stump's action, Linda Sparkman was deprived of all remedies. *Amicus* submits that the Court should clearly recognize that its delicate balancing of interests, consistently employed, has been irrevocably upset and that to shield Judge Stump with absolute immunity would be inconsistent with the prior reasoning of this Court.

### C. Public Policy Would Be Well Served by an Affirmance of the Lower Court's Decision.

A finding by this Court that Judge Stump's actions are not to be shielded by the doctrine of judicial immunity is a narrow one. When the judicial system operates properly, trial court judges do not make drastic, irreversible decisions which are not subject to judicial review. An affirmance of the Seventh Circuit's decision need not open "the floodgates of litigation."



While the issue of judicial immunity is a narrow one in this case, Linda Sparkman's substantive rights are substantial.

As a result of the ill-founded eugenics movement, tens of thousands of our Nation's mentally retarded citizens were unnecessarily sterilized. While not of the magnitude of Germany's shame, our own history is not filled with pride.

A half century ago, the Supreme Court, speaking through Justice Holmes, enunciated a misguided understanding of mental retardation in *Buck* v. *Bell*, 274 U.S. 200 (1927).

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who have already sapped the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetents. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes. . . . Three generations of imbeciles are enough.

*Id.* at 207.

It is now understood that mentally retarded persons, who are seeking their rightful place in society's mainstream, can be deeply affected by the involuntary sterilization process. Dr. Philip Roos, Executive Director of the National Association of Retarded Citizens, recently wrote that "mentally retarded persons apparently do not generally accept sterilization gladly as once assumed." [19]

---

[19] Roos, *Psychological Impact of Sterilization on the Individual*, Law & Psychology Rev. 45, 50 (Spring, 1975).

Dr. Roos outlines a psychological impact of sterilization which often "symbolizes punishment and may be synonymous in their minds with castration." [80]

While this case does not require the Court to make pronouncements with regard to the full extent of necessary protections which should be afforded individuals as to whom involuntary sterilization is sought, *amicus* believes that this Court's decision may affect such processes. While medical and social science thinking has changed substantially over the past several decades, many handicapped individuals continue to be adversely affected by the stereotypes which have continued beyond the scientific demise of the eugenics movement.

While involuntary sterilization is decreasing as a practice, in large part due to the sensitive response of the judiciary, sterilization is still subject to abuse.[81] This Court has recognized that "[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). While an affirmance of the Seventh Circuit in this case will not open the "floodgates of litigation," *amicus* believes that a reversal of the Seventh Circuit may be read as a reaffirmation by this Court of the now disproved notions which received support in *Buck* v. *Bell*.

*Amicus* asks this Court to recognize that "[t]he central importance of the family to our way of life transcends all cultural boundaries—ethnic, religious, social, and economic. Neither does the desire to have children diminish with handicapping conditions." [82] In balancing the various interests in the doctrine of judicial immunity,

[80] *Id.* at 48.

[81] Soskin, *Voluntary Sterilization—Safeguarding Freedom of Choice*, 2 Amicus 50 (February, 1977).

[82] Linn, *Involuntary Sterilization—A Constitutional Awakening to Fundamental Human Rights*, 2 Amicus 35 (February, 1977).



this Court is asked to weigh heavily the interest which the public holds in the right to bear and beget children.

*Amicus* also asks this Court to consider the interest which society has in assuring a judicial system wherein the actions of any one member of the bench are always open to reasoned review. In balancing the public's interest in this case, *amicus* argues that a finding that Judge Stump is shielded by judicial immunity from the action brought by Linda Sparkman would be to sanction tyranny from the bench.

## CONCLUSION

For the reasons discussed in this brief, *amicus* respectfully requests this Court to affirm the decision of the Court of Appeals for the Seventh Circuit, which would return this matter to the District Court for a trial on the merits.

Respectfully submitted,

RONALD M. SOSKIN
Counsel for *amicus curiae* *
National Center for Law and
the Handicapped, Inc.
1235 North Eddy Street
South Bend, Indiana 46617
(219) 288-4751

*Of Counsel:*

JOHN CONNAUGHTON
BRIAN J. LINN

*Amicus curiae* wishes to gratefully acknowledge the assistance of Carole Connaughton, Ph.D., Indianapolis, Indiana, and Richard LaSalvia, Legal Intern, for their professional assistance in the preparation of this brief.

MOTION FILED
DEC 16 1977

Supreme Court, U. S.
FILED
JAN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
and
## BRIEF FOR AMICI CURIAE
## AMERICAN COALITION OF CITIZENS WITH DISABILITIES; EPILEPSY FOUNDATION OF AMERICA; COUNSEL FOR HANDICAPPED PEOPLE; DEVELOPMENTAL DISABILITIES LAW PROJECT

MARCIA PEARCE BURGDORF
*Of Counsel*

ROBERT L. BURGDORF, JR.
DONALD N. BERSOFF
NANCY B. SHUGER
500 W. Baltimore Street
Baltimore, Md. 21201
*Attorneys for Amici Curiae*

The Paul M. Harrod Company, Baltimore, Maryland 21234

## TABLE OF CONTENTS

Page

TABLE OF CITATIONS. . . . . iii

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE . . . . . xi

INTEREST OF AMICI CURIAE. . . . . 1

SUMMARY OF ARGUMENT. . . . . 2

ARGUMENT. . . . . 5

I. There was Clear Absence of Jurisdiction for Petitioners to Consider and Approve the Petition for the Serilization of Respondent. . . . . 5

A. Because Sterilization Is A Drastic Procedure Which Is Scientifically, Medically, and Judicially Disfavored, and Because Procreation Is a Fundamental Personal Right, Courts Have Never Been Deemed to Possess Inherent Jurisdiction to Approve Sterilizations.. . . . . 6

B. Jurisdiction to Order Sterilization Can Exist, If At All, Only Pursuant to Specific Statutory Authorization. . . . . 12

C. Petitioner Had No Statutory or Common Law Basis for His Approval of the Sterilization of Respondent . 17

D. Petitioner Clearly Lacked Jurisdiction Over the Person of Respondent. . . . . 23

E. Petitioner Had Jurisdiction to Hear the Question of Jurisdiction, But No Jurisdiction to Consider and Approve the Petition. . . . . .25

F. Jurisdiction of a Court Cannot be Exercised in Total Absence of Due Process of Law. . . . . .27

II. The Asserted Basis for the Creation of a Doctrine of Absolute Judicial Immunity Is Unsound and Unsupportable and the Doctrine Should Be Abolished. . . . . .31

A. Respondent Satisfies All Requirements for recovery Under §1983. . . . . .32

B. The Justification Relied Upon to Create Absolute Judicial Immunity Are Not Supported within the Common Law or Legislative History of §1983. . . . .34

1. The Common Law. . . . . .34

2. The Legislative History of the 1871 Civil Rights Act. . . . . .39

C. The Interests Undergirding the Continuance of Absolute Judicial Immunity from Civil Damage Liability Under §1983 Are Not Logically Supportable. . . . . .48

D. The Justifications Offered for Absolute Judicial Immunity Apply Equally to Other State Officials for Whom This Court Has Abolished the Doctrine. . .50

E. If Injunctions Against State Judicial Officers are Permissible, It Is Unreasonable to Bar Money Damage Recovery. . . . . .52



III. If Not Totally Abolished, the Doctrine of Judicial Immunity Should be Attenuated to Allow the Recovery of Damages in Situations Where a Judicial Act Creates an Irreversible Abrogation of Fundamental Rights Without Any Alternative Remedy. . . . . .55

A. The Fundamental Constitutional Rights at Stake. . . .55

B. Damages Is the Only Available and Appropriate Remedy to Redress the Violation of Respondent's Constitutional Rights Caused by Petitioner's Authorization of Her Sterilization. . . . . .58

CONCLUSION . . . . . .67

## TABLE OF CITATIONS

*Cases*

*A.L. v. G.R.H.*, 325 N.E. 2d 501 (Ind. App. 1975), cert. den. 425 U.S. 936 (1976). . . . . xiii,9,22
*Armstrong v. Manzo*, 380 U.S. 545 (1965). . . . . .28
*Barr v. Matteo*, 360 U.S. 564 (1959). . . . . 33,49
*Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965). . . . . .32
*Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966) . . . . .37,38,43
*Beall v. Smith*, L.R. 9 Ch. 85 (1873). . . . . .8
*Bell v. Hood*, 327 U.S. 678 (1946). . . . . 62,63
*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). . . . . 63,64
*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). . . . .33,36,50
*Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933) . . . . . .7
*Buck v. Bell*, 274 U.S. 200 (1927). . . . . Passim
*In re Clark*, 21 Oh. Op. 2d 86, 185 N.E. 2d 128 (1962). . . . . .23
*Cooper v. Reynolds*, 77 U.S. 308 (1870). . . . . 6,24,25,26
*Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914). . . . . .7
*Doe v. McMillan*, 412 U.S. 306 (1973) . . . . . 33,49

*Dunn v. Blumstein*, 405 U.S. 330 (1972) .....30
*Eisenstadt v. Baird*, 405 U.S. 438 (1972) ..... 13,15,32,58
*Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972).....53
*Floyd v. Barker's Case*, 77 Eng. Rep. 1305 (Star Chamber 1608) .....34
*Frazier v. Levi*, 440 S.W. 2d 393 (Tex. Civ. App. 1969) ..... 16,18
*Griffin v. Breckenridge*, 403 U.S. 88 (1971) .....46
*Griswold v. Connecticut*, 381 U.S. 479 (1965) ..... 32,58
*Hamilton v. Rathbone*, 175 U.S. 414 (1899).....38
*Harris v. Hardeman*, 55 U.S. 334 (1852).....24
*Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, 166 N.W. 938 (1918) .....7
*In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942).....7
*Holmes v. Powers*, 439 S.W. 2d 579 (Ky. 1968) .....16,18,21
*Hostrop v. Board of Junior College* District No. 515, 523 F.2d 569 (7th Cir. 1975).....64
*Imbler v. Pachtman*, 424 U.S. 409 (1976).....48,49,60
*Ingraham v. Wright*, 430 U.S. 651 (1977)..... 62,64,65,66
*Jacobson v. Massachusetts*, 197 U.S. 11 (1905).....56,64
*Johnson v. Louisiana*, 406 U.S. 356 (1972).....38
*Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951) .....28
*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1951) .....46
*In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) .....16,18,22
*Kendall v. United States*, 37 U.S. 524 (1838) .....24
*In re Lambert*, No. 61156 (Probate Ct. Davidson Cty. Tenn., Mar. 4, 1976).....16,18,21
*Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969) *aff'd on other grounds* 401 U.S. 154 (1971)..... 32,53
*Leman v. Krentlar - Arnold Hinge Last Co.*, 284 U.S. 448 (1932) .....53
*Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds sub nom O.Shea v. Littleton*, 414 U.S. 488 (1974)..... 43,50



*Lynch v. Household Finance Corp.*, 404 U.S. 538 (1972) .....40,43,66
*Marbury v. Madison*, 1 Cranch 137 (1803) ..... 61,62
*Mathews v. Eldridge*, 424 U.S. 319 (1976) .....28
*Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869) .....38
*Meyer v. Nebraska*, 262 U.S. 390 (1923)..... 56,65
*Mickle v. Henricks*, 262 F. 687 (D. Nev. 1918).....7
*Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967) .....55
*Mitchum v. Foster*, 407 U.S. 225 (1972).....40,48,52
*In re M.K.R.*, 515 S.W. 2d 467 (Mo. 1974)..... 16,17,18,22
*Monroe v. Pape*, 364 U.S. 167 (1961)..... 32,39,43,44,51,60
*Morrison v. State*, 252 S.W. 2d 97 (K.C. App. 1952).....23
*Mullaney v. Wilbur*, 421 U.S. 684 (1975) .....38
*Neal v. Brim*, 506 F.2d 6 (5th Cir. 1975) .....32
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).....38
*Nixon v. Condon*, 286 U.S. 73 (1932)..... 62,64
*Nixon v. Herndon*, 273 U.S. 536 (1927)..... 62,64
*N.C. Ass'n for Retarded Children v. State of N.C.*, 420 F. Supp. 451 (M.D.N.C. 1976) ..... 11,14
*O'Connor v. Donaldson*, 422 U.S. 563 (1975).....33
*Olmstead v. United States*, 277 U.S. 438 (1928).....56
*In re Opinion of the Justices*, 230 Ala. 543, 162 So. 123 (1935) .....7
*O'Shea v. Littleton*, 414 U.S. 488 (1974) .....43,48,50,59,60
*Palko v. Connecticut*, 302 U.S. 319 (1937)..... 56,65
*Pennoyer v. Neff*, 95 U.S. 714 (1878).....24
*Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 295 (E.D. Pa. 1972) .....29
*Picking v. Pennsylvania R. Co.*, 151 F. 2d 240 (3rd Cir. 1945) .....36,37,38
*Pierson v. Ray*, 386 U.S. 547 (1967)..... Passim
*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)..... 23,24,32,58
*Prince v. Massachusetts*, 321 U.S. 158 (1944).....22
*Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868)..... 35,36,50

*Rhode Island v. Massachusetts*, 37 U.S. 657 (1838) ..... 5,17
*Robertson v. Labor Board*, 268 U.S. 619 (1925).....24
*Roe v. Wade*, 410 U.S. 113 (1973) ..... 52,58
*San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973)..... 12,30,32,58
*Scheuer v. Rhodes*, 416 U.S. 232 (1974)..... 33,48,49,51
*Schwegmann Bros. v. Calvert Pistillers Corp.*, 341 U.S. 384 (1951).....43
*Screws v. United States*, 325 U.S. 91 (1945).....43
*Shapiro v. Thompson*, 304 U.S. 618 (1969) .....13
*Shelton v. Tucker*, 364 U.S. 479 (1969) ..... 30,31
*Skinner v. Oklahoma*, 316 U.S. 535 (1942)..... Passim
*Smith v. Board of Examiners*, 85 N.J.L. 46, 88A, 863 (1913).....7
*Snyder v. Massachusetts*, 291 U.S. 97 (1934) .....56
*Spalding v. Vilas*, 161 U.S. 483 (1896) ..... 48,51
*Stanley v. Georgia*, 394 U.S. 557 (1969).....56
*State v. Libbert*, 96 Ind. App. 84, 177 N.E. 873 (1931) *rehearing denied*, 96 Ind. App. 84, 180 N.E. 757 (1932) .....19
*State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).....23
*State ex rel. Bingham v. Home Brewing Co. of Indianapolis*, 183 Ind. 75, 105 N.E. 909 (1914).....19
*Sterling v. Constantin*, 287 U.S. 378 (1932).....52
*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) .... 63,64
*Tenney v. Brandhove*, 341 U.S. 367 (1951) ..... 37,38
*Terry v. Ohio*, 392 U.S. 1 (1968) .....62
*Texas and New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930)..... 62,64
*Texas and Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916) ..... 62,64
*In re Thomson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), *aff'd sub nom. Osborn v. Thomson*, 185 App. Div. 902, 171 N.Y. 1094 (1918).....7
*Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891) ..... 56,65



*United States v. Classic*, 313 U.S. 299 (1941)..... 32,51
*United States v. Guest*, 383 U.S. 745 (1966).....46
*United States v. Price*, 383 U.S. 787 (1966) .....46
*Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) .....24
*Ex parte Virginia*, 100 U.S. 339 (1879).....33,48,60
*Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), *motion den.* 356 F. Supp. 380 (S.D. Ohio 1973). Passim
*Walker v. City of Birmingham*, 388 U.S. 307 (1967).....53
*Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952).....23
*Williams v. Florida*, 399 U.S. 578 (1970) .....38
*Williams v. Rhodes*, 393 U.S. 23 (1968) .....55
*Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921) ..... 7,9
*Windsor v. McVeigh*, 93 U.S. 274 (1876) .....20,25,26,27,31
*Wisconsin v. Constantineau*, 400 U.S. 433 (1971).....29
*Wisconsin v. Yoder*, 406 U.S. 205 (1971) ..... 22,23
*Wood v. Strickland*, 420 U.S. 308 (1975) ..... 33,49
*Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503 (1927).....50
*Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969) .....24

*Constitutional Provisions and Statutes*

U.S. Const., Art. I, §6.....1
U.S. Const., amend, XIV..... Passim
42 U.S.C. §1983..... Passim
Ind. Acts 1907, c. 215 .....9
Burns Ind. Stats, Ann. §§ 16-13-13-1 through 16-13-13-4 (19F1)..... 9,18
Burns Ind. Stats. Ann. § 33-4-4-3 (19F1).....19
Burns Ind. Stats. Ann. § 16-8-3-1 (19F1).....21
Burns Ind. Stats. Ann. § 16-8-4-2 (19F1).....21
Justices Protection Act. 11 & 12 Vict. c. 44 (1848) .....35

*Miscellaneous*

Bligh, Sterilization and Mental Retardation, 51 A.B.A. J. 1059 (1965) ..... .8
Brand, The Discipline of Judges, 46 A.B.A.J. 1315 (1960) ..... .61
Brazier, Judicial Immunity and the Independence of the Judiciary, Public Law 297, Winter (1976) ..... .50
R. Burgdorf and M.P. Burgdorf, The Wicked Witch is Almost Dead: *Buck v. Bell* and the Sterilization of Handicapped Persons, 50 Temp. L.Q. 995 (1977) ..... xiii,7,13,15
Committee of the American Neurological Association, Eugenical Sterilization (1936) ..... .9
Committee to Study Contraceptive Practices and Related Problems, American Medical Association Proceedings 54 (May, 1937) ..... .10
Cong, Globe, 39th Cong., 1st Sess. (1866) ..... .41,42,43
Cong. Globe, 42d Cong., 1st Sess. (1871) ..... 40,44,45,46,47,66
Note, Courts -- Scope of Authority -- Sterilization of Mental Defectives, 61 Mich. L. Rev. 1359 (1963) ..... .8
Ferster, Eliminating the Unfit -- Is Sterilization the Answer?, 27 Ohio St. L.J. 591 (1966) ..... .9,11,15
Fiss, The Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University 8 (April 5, 1976) ..... 53,54
Gamble, What Proportion of Mental Deficiency is Preventable by Sterilization?, 57 Am. J. Mental Defic. 123 (1952) ..... .10
Gauvey and Shuger, The Permissibility of Involuntary Sterilization under the Parens Patriae and Police Power Authority of the State: In re Sterilization of Moore, 6 Md. L. Forum 109 (1976) ..... xiii
Gest, Eugenic Sterilization: Justice Holmes v. Natural Law, 23 Temp. L.Q. 306 (1950) ..... .15



Note, Human Sterilization, 35 Ia. L. Rev. 251 (1950) ..... .10
Note, Immunity of Federal and State Judges from Civil Suit -- Time For A Qualified Immunity? 27 Case West. Res. L. Rev. 727 (1977) ..... .34,35,37,50,54
Note, the Individual and the Involuntary Sterilization Laws; 1966, 31 Albany L. Rev. 97 (1967) ..... .14
Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263 (1936) ..... .50
Kates, Immunity of State Judges Under the Federal Civil Rights Acts: *Pierson v. Ray* Reconsidered, 65 Nev. V. L. Rev. 615 (1970) ..... .34,43,46,50,54
Kindregan, Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States, 43 Chicago-Kent L. Rev. 123 (1966) ..... .10,14,15
Note, Liability of Judicial Officers Under Section 1983, 79 Yale L.J. 322 (1969) ..... 34,35,36,46,50,61
McCormack & Kirkpatrick, Immunities of State Official Under Section 1983, Rutgers-Camden L.J. 65 (1976) ..... .50
Miller, Discipline of Judges, 50 Mich. L. Rev. 237 (1952) ..... .61
Murdock, Sterilization of the Retarded: A Problem or a Solution?, 62 Cal. L. Rev. 917 (1974) ..... 8,10,14,15
O'Hara & Sanks, Eugenic Sterilization, 45 Geo. L. J. 20 (1956) ..... 8,9,14,15
Pollock & Maitland, *The History of English Law*, (2d ed. 1898) ..... .34
Reed, Mental Retardation and Fertility, 18 Supp. Social Biology, 542 (1971) ..... .30
Sterilization of Persons who are Mentally Retarded, an official statement of the American Association on Mental Deficiency, approved by the AAMD Executive Committee Mar. 8, 1974, Guideline IIIA ..... .12
Vukowich, The Dawning of the Brave New World -- Legal, Ethical and Social Issues of Eugenics, 1971 U.Ill. L. Forum 189 (1971) ..... .8
Wolfensberger, *The Origin and Nature of our Institutional Models* (1975) ..... .8

IN THE

# Supreme Court of the United States

October Term, 1977

---

No. 76-1750

---

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

---

The American Coalition of Citizens with Disabilities, the Epilepsy Foundation of America, the Counsel for Handicapped People, and the Developmental Disabilities Law Project move this Court for permission to file the attached Brief Amici Curiae. The proposed *amici* are "consumer" and legal advocacy organizations who represent the interests of handicapped persons. These organizations and their

memberships are vitally interested in the outcome of this case as it regards the legal permissibility of compulsory sterilization of disabled individuals.

The American Coalition of Citizens with Disabilities, Inc. (ACCD) is a not-for-profit organization whose members include organizations of disabled individuals. ACCD's national members include the American Council of the Blind, Epilepsy Foundation of America, National Association for Retarded Citizens, National Association of the Deaf, National Association of the Physically Handicapped, National Paraplegia Foundation, Paralyzed Veterans of America, and United Cerebral Palsy Associations. ACCD seeks to speak with a unified voice advocating on behalf of the nation's entire disabled population. ACCD has taken an active role in attempting to remedy past practices of discrimination against physically and mentally handicapped citizens.

Epilepsy Foundation of America (EFA) is a non-profit organization established to promote research, support educational and vocational programs, and provide educational information in regard to epilepsy and the problems faced by persons having epilepsy. EFA's national office in Washington, D.C. is responsible for national programs which include advocacy and patient services. In the past, persons with epilepsy have been among those who have been singled out for compulsory sterilization and, as part of its public education and advocacy efforts, EFA has successfully labored for the repeal of involuntary sterilization statutes in many states.

The Counsel for Handicapped People is a not-for-profit corporation whose purpose is to promote, encourage, and secure the human and legal rights of handicapped people. The



organization seeks to secure equality under law for handicapped persons through the enactment and implementation of legislation, through educational efforts, through administrative processes, and through litigation. One of the major areas of concern of the Counsel for Handicapped People is the protection of the marital, sexual, and procreative rights of individuals who have physical and mental handicaps.

The Developmental Disabilities Law Project is a law reform/legal education program of the University of Maryland Law School whose purpose is to advocate on behalf of the legal rights of developmentally disabled (mentally retarded, cerebral palsied, epileptic, autistic, and other severely disabled) persons. One of the priority concerns of the Project is protection of disabled persons' rights in regard to procreation and sterilization, and the Project has been involved in research, publication, and litigational efforts regarding issues raised by compulsory sterilization. Among the specific accomplishments of the Project in this area of the law have been the preparation of two law review articles* and the involvement of a Project attorney as co-counsel in *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. App. 1975), cert. den. 425 U.S. 936 (1976), which, as a relevant Indiana legal precedent, was and is a factor in the present case.

---

* R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 52 Temp. L.Q. 995 (1977); Gauvey & Shuger, *The Permissibility of Involuntary Sterilization Under the Parens Patriae and Police Power Authority of the State: In re Sterilization of Moore*, 6 Md. L. Forum 109 (1976).

The present case raises questions of the authority of judges to order the performance of involuntary sterilization operations in the absence of statutory authorization. To these questions, the proposed *amici* organizations would lend a perspective of the interests of disabled people generally, beyond the more confined presentations of the specific parties to this action. The proposed *amici* would present several factual and legal matters concerning the historical sources of compulsory sterilization, the reasons for its increasing disuse, and the legal questions it raises, which will not likely be provided to this Court by the parties in this case. The proposed *amici* hope to apprise this Court of the current status of involuntary sterilization practices in modern scientific philosophical, medical, and legal contexts, and to point out the grievous danger to handicapped citizens which would result if the modern trend of disfavor toward compulsory sterilization were to be reversed by permitting judges to authorize sterilizations in circumstances such as those in this case.

The proposed *amici* would also give voice to the personal interests and fundamental constitutional rights of handicapped people which are threatened by involuntary sterilization, and these organizations would argue the need for an appropriate remedy when such constitutional deprivations occur.

Some of the proposed *amici* organizations have devoted much time and energy to public education, drafting of legislation, and lobbying efforts aimed at securing the repeal of mandatory sterilization laws and educating physicians and other professionals as to the lack of scientific and medical justification for involuntary sterilization practices. By and large, the professional communities and public officials have become increasingly opposed to compulsory sterilization. And yet, these efforts by the proposed *amici*, medical and



scientific leaders, and state legislatures may come to nought if judges are granted the unilateral power to authorize sterilization in the absence of a statute so providing. The judicial conduct challenged in this action is of an extreme nature; it is an isolated example of a judicial act in which other judges have almost never engaged. But if no remedy is provided to the Respondent in this case and if the Petitioner is allowed to escape from liability for his acts, then there is a grave danger to handicapped people that such judicial conduct will be replicated. And, although it has been stymied by modern legislative efforts and scientific enlightenment, the specter of compulsory sterilization could thus rise again.

The technical issues of jurisdiction and judicial immunity dealt with in this case should be examined within the context of the serious dangers to fundamental personal rights of disabled citizens which are entailed by the factual situation from which the case arises. The proposed *amici* organizations hope to provide such a broader, substantive perspective to this Court.

Wherefore, the American Coalition of Citizens with Disabilities, the Epilepsy Foundation of America, the Counsel for Handicapped People, and the Developmental Disabilities Law Project respectfully pray this Court for permission to file the attached Brief Amici Curiae.

December 16, 1977

ROBERT L. BURGDORF, JR.
500 W. Baltimore Street
Baltimore, Md. 21201

***Counsel for the American Coalition of Citizens with Disabilities, the Epilepsy Foundation of America, the Counsel for Handicapped People, and the Developmental Disabilities Law Project***

IN THE

# Supreme Court of the United States

October Term, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and WARREN G. SUNDAY,
*Petitioners,*

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF FOR AMICI CURIAE AMERICAN COALITION OF CITIZENS WITH DISABILITIES; EPILEPSY FOUNDATION OF AMERICA; COUNSEL FOR HANDICAPPED PEOPLE; DEVELOPMENTAL DISABILITIES LAW PROJECT

## INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set out in the attached Motion for Leave to File Brief Amici Curiae, pp. xi - xv, *supra.*

## SUMMARY OF ARGUMENT

There is no legal precedent, either historical or recent, for courts to possess an inherent authority to authorize sterilizations. Indeed, modern scientific, medical, and judicial disfavor of compulsory sterilization argues strongly against the existence of such authority. Sterilization is a drastic invasion of fundamental personal rights, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the eugenics theories which were once thought to support involuntary sterilization have long since been disproven.

The power to order sterilization, if it can be justified in any circumstances, is certainly not justifiable in the absence of a specific statutory provision so authorizing. In this case, Petitioner had no statutory or common law authority to approve sterilization of Respondent. Moreover, because Petitioner did not cause notice of the petition for sterilization to be given to Respondent and did not give her any opportunity to appear or to be represented in the proceedings, Petitioner lacked jurisdiction over the person of Respondent.

It is of no avail for Petitioner to argue that every court has the jurisdiction to hear the question of its own jurisdiction, for Petitioner went far beyond the consideration of the extent of his own jurisdiction and proceeded to approve the sterilization of Respondent.

In addition, Petitioner acted in this case in the complete absence of any and all elements of procedural due process which are essential to the exercise of judicial jurisdiction. By acting in the absence of statutory authority, by failing to appoint a guardian ad litem, by failing to have



any notice given to Respondent, by failing to hold any hearing, by failing to file anything in court, and by failing to allow any appeal, Petitioner clearly removed this case from the scope of his jurisdiction.

While Respondent satisfies all the specific requirements for recovery of damages in actions under 42 U.S.C. §1983, she is faced with the doctrine of judicial immunity as a possible bar to her recovery, *Pierson v. Ray*, 386 U.S. 547 (1967). The doctrine of judicial immunity is, however, inapplicable in this case because Petitioner acted in clear absence of jurisdiction. Moreover, amici suggest that the justifications offered in *Pierson* for an absolute judicial immunity are not sound, and that a review of the common law doctrine of judicial immunity and an examination of the legislative history surrounding §1983 reveals that *Pierson* was wrongly decided.

The doctrine of absolute judicial immunity does not serve legitimate public interests. The justifications which are offered in support of the doctrine apply equally well to other state officials, and yet this Court has seen fit to abolish official immunity in those other contexts. It is also logically inapposite to continue to allow absolute judicial immunity to monetary damages while at the same time injunctions are permitted to be issued against state judicial officers.

For these reasons, the doctrine of absolute judicial immunity as a bar to damage actions under §1983 is not on a sound footing and should be abolished.

But even if this Court does not wish to go so far as to abolish absolute judicial immunity, the doctrine should

certainly not be applied in a situation like the present case where its application would prohibit the only possible remedy for the deprivation of Respondent's constitutional rights. Procreation and privacy are fundamental constitutional rights; Respondent suffered a denial of these rights because of Petitioner's acts. In the circumstances of this case, where Respondent learned of her sterilization only long after the fact, and no other appropriate remedies are available, an action for monetary damages under §1983 represents Respondent's only hope for vindication of her rights. In these circumstances, the doctrine of absolute judicial immunity should be attenuated to permit Respondent a remedy for the irreversible abrogation of her fundamental rights.

---



## ARGUMENT

### I.

### THERE WAS CLEAR ABSENCE OF JURISDICTION FOR PETITIONER TO CONSIDER AND APPROVE THE PETITION FOR THE STERILIZATION OF RESPONDENT.

The requirement that courts must possess jurisdiction over matters in which they presume to take judicial action is a longstanding principle of American jurisprudence. In 1838, this Court, in setting out ground rules concerning the necessity of jurisdiction, said that whenever the question of jurisdiction arises:

> it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extrajudicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.
>
> *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838).

It is a matter of almost equally venerable precedent that jurisdiction requires: (1) authority over the subject matter of

a proceeding; (2) authority over the parties; and (3) the power to take the action or render the judgment contemplated. *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). The Petitioner in this action acted in circumstances where there was a clear absence of each of these elements of jurisdiction.

**A. Because Sterilization Is a Drastic Procedure Which Is Scientifically, Medically, and Judicially Disfavored, and Because Procreation Is a Fundamental Personal Right, Courts Have Never Been Deemed to Possess Inherent Jurisdiction to Approve Sterilizations.**

> We are dealing here with . . . one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.
> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

Because of such sentiments, compulsory sterilization has generally been viewed with disdain in American society. The courts in this country have cast a wary eye upon legislative enactments which seek to impose a permanent deprivation of the ability to procreate and have been quick to strike down forced sterilization practices which come into conflict with the constitutional rights of affected individuals. Thus, sterilization measures have been judicially invalidated as



violative of equal protection of the laws,[1] as denials of due process of law,[2] as "cruel and unusual punishment",[3] and even as "bills of attainder".[4] In light of the importance of the rights at stake and of the gravity to the individual of the irreversible intrusion of sterilization, it is not surprising that there is no legal precedent for judges to order sterilization simply by claiming that they possess the inherent power to do so.

There is no English common law precedent for an inherent authority of courts to order sterilization

---

[1] *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, 166 N.W. 938 (1918); *Smith v. Board of Examiners*, 85 N.J.L. 46, 88 A.963 (1913); *In re Thomson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), aff'd sub nom. *Osborn v. Thomson*, 185 App. Div. 902, 171 N.Y.S. 1094 (1918).

[2] *In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933); *In re Opinion of the Justices*, 230 Ala. 543, 162 So. 123 (1935); *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921); *Davis v. Berry*, 216 F. 413, 418 (S.D. Iowa 1914).

[3] *Davis v. Berry*, 216 F. 413, 416-417 (S.D. Iowa 1914); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918).

[4] *Davis v. Berry*, 216 F. 413, 419 (S.D. Iowa 1914). The cases discussed in nn. 1-4 should be contrasted with *Buck v. Bell*, 274 U.S. 200 (1927), discussed below at pp. 13-16 *see generally*, R. Burgdorf and M.P. Burgdorf, *"The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons,"* 50 Temp. L.Q. 995 (1977).

procedures.[5] Indeed, it was not until the end of the nineteenth century that a practical and effective surgical method for producing sexual sterility was devised.[6] The development of tubal ligation and vasectomy operations around the turn of the century occurred at about the same time as a "eugenics scare" began to gain momentum in America.[7] Proponents of eugenics theories preached that our society was threatened by race degeneration through the spread of hereditary defects and advocated the scientific control of human heredity.[8] In the wake of such propaganda, a number of states passed compulsory eugenic

[5] *See*, Note, *Courts – Scope of Authority – Sterilization of Mental Defectives*, 61 Mich. L. Rev. 1359, 1360-1361 (1963). The British common law principles in regard to jurisdiction over incompetent persons were summed up in *Beall v. Smith*, L.R. 9 Ch. 85 (1873): "It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatsoever. The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward."

[6] *See*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 920 (1974); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20 (1956).

[7] *See*, Vukowich, *The Dawning of the Brave New World – Legal, Ethical, and Social Issues of Eugenics*, 1971 U. Ill. L. Forum 189 (1971); Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965).

[8] *Ibid.; see also*, Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123 (1966); Wolfensberger, *The Origin and Nature of our Institutional Models* 33-39 (1975).



sterilization statutes.[9] Ironically, the nation's first such law was passed in 1907 in Indiana, the state in which the present controversy arose.[10] This Indiana statute was found to be unconstitutional by the Indiana Supreme Court in 1921,[11] was replaced by a redrafted statute, and was finally repealed in 1974.[12]

The eugenics movement was in vogue for a relatively short period of time. From the early 1930's onward, modern scientific studies began to challenge and undermine the eugenicists' theories.[13] It became increasingly apparent that the laws of heredity developed by Mendel in his

[9] O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo L.J. 20, 22 (1956).

[10] Ind. Acts. 1907, c. 215.

[11] *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921).

[12] 1971 Indiana Code 16-13-13-1 through 16-13-13-4; *A.L. v. G.R.H.*, 325 N.E. 2d 501, 502 n.1 (Ind. App. 1975), cert. den. 425 U.S. 936 (1976).

[13] In 1936, the American Neurological Association issued a report which criticized the overwhelming emphasis being given to heredity as a cause of mental retardation, mental illness, epilepsy, pauperism, and other disabilities. The report concluded that environmental factors were at least as potent as genetic factors in causing these handicaps and that there was no evidence of any increase in such conditions or of any biological deterioration of the human race, and asserted that under the present state of knowledge concerning heredity, no compulsory sterilization programs were justified. Committee of the American Neurological Association, Eugenical Sterilization (1936), discussed in Ferster, *Eliminating the Unfit–Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 602-603 (1966).

experimentation with peas cannot be applied *carte blanche* in the context of human characteristics.[14] Contrary to the beliefs of eugenics zealots, two mentally retarded parents often bear childen of normal intelligence. Conversely, it has been estimated that 89 percent of all mentally retarded children come from "normal" parentage.[15] Theories that epilepsy, insanity, and other traits are hereditary were likewise refuted by modern scientific evidence.[16]

As the eugenics movement has waned, so has the prevalence of and the justification for non-consensual

---

Footnote [13] (Continued)

In 1937, the American Medical Association declared: "Our present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons." Committee to Study Contraceptive Practices and Related Problems, *American Medical Association Proceedings*, 54 (May, 1937), quoted in Ferster, *id.*, at 603.

[14] *See*, Note, *Human Sterilization*, 35 Ia. L. Rev. 251, 254 (1950).

[15] *Ibid.*; Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 139 (1966). One study of two institutions for mentally retarded children found that 15 percent of the children were born of parents one or both of whom were retarded, i.e., 85 percent were born of "normal" parents, Gamble, *What Proportion of Mental Deficiency is Preventable by Sterilization?*, 57 *Am J. Mental Defic.* 123, 124 (1952), discussed in Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 926 N.56 (1974).

[16] *See*, Note *Human Sterilization*, 35 Ia. L. Rev. 251, 254 (1950).



sterilizations. The number of states having compulsory sterilization laws has been decreasing, and even in states where there is such a law the number of sterilization operations actually performed has been dropping.[17]

Physicians and other professionals have become skeptical of the benefits to be derived from compulsory sterilization. The current medical outlook was recently summed up in the findings of a three-judge federal court which examined a North Carolina statute dealing with the sterilization of mentally retarded people:

> We think it a fair statement, from the expert testimony we have heard and read, to say that the best opinion presently is that rarely would a competent doctor recommend involuntary sterilization – but that he might do so in an extreme case. As a corollary to that proposition, it is also fair to say, we think, that prevalent medical opinion views with distaste even voluntary sterilization for the mentally retarded and is inclined to sanction it only as a last resort and in relatively extreme cases. In short, the medical and genetical experts are no longer sold on sterilization to benefit either retarded patients or the future of the Republic.
>
> *N.C. Ass'n. for Retarded Children v. State of N.C.*, 420 F. Supp. 451, 454 (M.D.N.C. 1976).[18]

---

[17] Ferster, *Eliminating the Unfit–Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 613, 619 (1966).

[18] The court went on to observe: "Between June 1970 and April, 1974, 23 sterilizations were performed upon residents of North Carolina's mental retardation centers pursuant to the provision of the preceding statute. Viewed over a longer time span, there has been a diminishing frequency in use of the sterilization procedure, reflecting, we think, diminishing confidence of medical doctors in its efficacy for any purpose except to prevent conception. That will do." *Id.* at 454.

This professional disfavor of unconsented sterilization was highlighted in 1974 when the American Association on Mental Deficiency, an organization of professionals, many of whom are employed in public facilities for mentally retarded persons, issued an official policy statement which declared: "The American Association on Mental Deficiency strongly opposes the enactment and application of statutes that permit involuntary sterilization."[19]

Therefore, not only is there no historical precedent for a court to have an inherent power to order sterilization, but the judicial, scientific, and medical antipathy toward compulsory sterilization make it clear that there is no legitimate rationale for a judge to invent such a power. At a time in history when legislatures, physicians, and scientists agree that compulsory sterilization is not justifiable, a judge has no authority unilaterally to conjure up the power to deprive a citizen of the right to procreate, "one of the basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also, San Antonio School District v. Rodriquez*, 411 U.S. 1, 34 n. 76 (1973).

**B. Jurisdiction To Order Sterilization Can Exist, If At All, Only Pursuant to Specific Statutory Authorization.**

This Court has had two previous opportunities to examine the legal validity of compulsory sterilization. In the most recent of these cases, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the right to procreate was specifically declared to

[19] Sterilization of Persons who are Mentally Retarded, an official statement of the American Association on Mental Deficiency, approved by the AAMD Executive Committee March 8, 1974, Guideline IIIA.



be a fundamental constitutional right. *Id.* at 541. *Skinner* involved a challenge to a statute authorizing the involuntary sterilization of "habitual criminals," a category which included convicted larcenists but not embezzlers – a nearly indistinguishable class of criminals. In striking the statute down as a violation of equal protection, the Court held that sterilization statutes are to be subjected to strict judicial scrutiny:

> [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.
> *Id.* at 514.

Under this strict scrutiny standard, a statutory classification will be unconstitutional unless a compelling governmental interest can be demonstrated. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The other Supreme Court decision dealing with sterilization occurred in 1927 when, at the height of a "eugenics scare" which gripped the United States and some other countries, a compulsory sterilization statute was upheld in *Buck v. Bell*, 274 U.S. 200 (1927). In the ensuing fifty years, most of the scientific and legal basis of *Buck v. Bell* have been discredited.[20] The eugenic and racial purification

[20] *See generally*, R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977).

theories which gave rise to the decision have long been discarded.[21] It is generally agreed that the phrase "Three generations of imbeciles are enough," *id.* at 207, upon which Justice Holmes based his reasoning in writing the opinion of the Court, was a serious misinterpretation of the facts of the case. Neither the mother of Carrie Buck nor Carrie's daughter were "imbeciles." In fact, the latter turned out to be very bright.[22]

In *N.C. Ass'n for Retarded Children v. State of N.C.*, 420 F. Supp. 451 (M.D.N.C. 1976) the court found that, "Most competent geneticists now reject Social Darwinism and doubt the premise implicit in Mr. Justice Holmes' incantation . . . " *Id.* at 454.

---

[21] *See*, nn. 13-16, *supra*, and accompanying text. The collapse of the scientific foundation of the *Buck v. Bell* analysis has been aptly summarized: "In the . . . decades since *Buck v. Bell* was handed down, concepts of heredity that gave the eugenic sterilization laws much of their substance have been eroded by the further development of science. Examination of the present state of science discloses little ground indeed for the eugenic sterilization laws to rest upon." Note, *The Individual and the Involuntary Sterilization Laws*, 1966, 31 Albany L. Rev. 97, 102 (1967).

[22] *See, e.g.*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 921 (1974); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 31-32 (1956); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 133, n.52 (1966).



The analysis employed by the Court in *Buck v. Bell* is also subject to question because it involved only a rational basis standard of review of the challenged sterilization statute. Subsequent rulings, such as *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), have made it clear that procreation is a fundamental right and that measures which seek to deny that right must be subjected to compelling state interest scrutiny. The apparent inconsistencies of the holdings in *Buck* and in *Skinner* suggest that the reasoning in *Buck* may well be anachronistic today.[23]

For these and other reasons, Justice Holmes' opinion in *Buck v. Bell* has been widely and severely criticized.[24] Some commentators have speculated that this Court would reverse its holding if again asked to rule on a eugenic sterilization law.[25]

---

[23] *See*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 921-922 (1974).

[24] *E.g.* R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977); Gest, *Eugenic Sterilization: Justice Holmes v. Natural Law*, 23 Temp. L.Q. 306 (1950); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 29-32 (1956); Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 617 (1966); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles'* and the *Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 134-135, 143 (1966).

[25] *E.g.*, Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 596, n.29 (1966) and the authorities cited therein.

But whatever the shortcomings and current viability of *Buck v. Bell*, 274 U.S. 200 (1927), it is clear that neither in it, in *Skinner*, nor in any other case, has this Court ever indicated that compulsory sterilization could be imposed in the absence of a specific statutory provision. While there may be unsettled questions concerning the authority of states to prescribe sterilizations by statute, there is not and never has been any question that states can mandate sterilization in the absence of a statute. Indeed, if governmental bodies could deprive individuals of rights as important as procreation without any legislative enactment so authorizing, basic concepts of individual rights, democracy, and due process of law would be meaningless.

Lower courts have made it clear that there can be no jurisdiction to order sterilization of minors or mentally incompetent persons in the absence of a specific statutory provision: *Frazier v. Levi*, 440 S.W. 2d 393 (Tex. Civ. App. 1969) (no jurisdiction for county probate court having general jurisdiction to approve sterilization of mentally retarded woman); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (probate court with exclusive jurisdiction in guardianship matters did not have jurisdiction to order sterilization of adult mentally defective woman); *Holmes v. Powers*, 439 S.W. 2d 579 (Ky. 1968) (courts of Kentucky had no authority to grant permission for sterilization of mentally retarded woman); *In re M.K.R.*, 515 S.W. 2d 467 (Mo. 1974) (juvenile division of circuit court did not have jurisdiction to authorize sterilization of a 13 year old mentally retarded girl); *In re Lambert*, No. 61156 (Probate Ct. Davidson Cty. Tenn., filed Mar. 4, 1976) (probate court lacked jurisdiction to approve sterilization of 18 year old mentally deficient woman); *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), *motion den.*



356 F. Supp. 380 (S.D. Ohio 1973) (probate judge who ordered sterilization of mentally retarded woman acted in the total absence of jurisdiction). In the words of the *In re M.K.R.* court, the awesome power to "irreversibly deny to a human being a fundamental right, the right to bear or beget a child * * * may be conferred only by specific statute," 515 S.W. 2d at 470-471.

As the Court of Appeals for the Seventh Circuit indicated in the present case:

> Although courts ought not to be discouraged from creating innovative legal remedies to meet changing social conditions, they may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate. If we were to say that jurisdiction existed to order sterilization without adherence to the requirements of institutionalization and procedural due process mandated by the Indiana legislature, we would be sanctioning tyranny from the bench. *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977)

**C. Petitioner Had No Statutory or Common Law Basis For His Approval of the Sterilization of Respondent.**

> If the law confers the power to render a judgment or decree, then the court has jurisdiction . . . *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838).

In the instant case, the Seventh Circuit Court of Appeals observed:

> In approving the Petition, Judge Stump cited no statutory or common law authority under which he was purporting to act. Moreover, counsel has not during the course of this litigation cited any specific

> statutory or common law basis under which a court can order the sterilization of a child simply upon the petition of a parent. 552 F.2d at 174.

There is, as was noted above,[26] no basis in English common law for the authorization of sterilization operations by a court. Nor have the American cases which have examined the issue of sterilization found any common law authority permitting a court to order a compulsory sterilization: *Frazier v. Levi,* 440 S.W. 2d 393 (Tex. Civ. App. 1969); *In re Guardianship of Kemp,* 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Holmes v. Powers,* 439 S.W. 2d 579 (Ky. 1968); *In re M.K.R.,* 515 S.W. 2d 467 (Mo. 1974); *In re Lambert,* No. 61156 (Probate Ct. Davidson Cty., Tenn., filed Mar. 4, 1976); *Wade v. Bethesda Hospital,* 337 F. Supp. 671 (S.D. Ohio 1971).

The only Indiana statute dealing with sterilization was contained in Burns Ind. Stats. Ann. §§16-13-13-1 through 16-13-13-4 (1971) (these sections have since been repealed). Those provisions concerned patients of state mental health facilities and institutions, and mandated specific due process procedural safeguards to be followed before sterilizations could be performed upon such persons. That statute clearly has no application to the present case as Respondent is not and never has been institutionalized, nor have any of the statutorily authorized procedural prerequisites been met. Actually, the existence of such a statute undercuts any argument that Petitioner possessed implied or inherent authority to authorize sterilizations, as it indicates clearly that in circumstances where the Indiana legislature wished to allow sterilizations it enacted a specific statute so providing. As the Indiana courts have observed:

> When the law is affirmative that a thing should be done by certain persons or in a certain manner, this

[26] *See* n.5, *supra.*



> affirmative matter contains a negative that it shall not be done by other persons or in another manner. *State ex rel. Bingham v. Home Brewing Co. of Indianapolis,* 183 Ind. 75, 105 N.E. 909, 916 (1914).

Petitioner points to Burns Ind. Stats. Ann. §33-4-4-3 (1971), which confers upon the circuit courts original jurisdiction "in all cases in law and in equity whatsoever . . . " and suggests that this is the source of his power to authorize sterilizations. Petitioner's interpretation of this section would lead one to believe that circuit judges have unlimited power to do anything and everything they wish without any legal or precedential restraints – the very type of "tyranny from the bench," 552 F.2d 172, 176, which concerned the Seventh Circuit in this action. Actually, of course, Indiana courts, like all courts, have limits to their jurisdiction. *See, e.g., State v. Libbert,* 96 Ind. App. 84, 177 N.E. 873 (1931), *rehearing denied,* 96 Ind. App. 84, 180 N.E. 757 (1932), where the Indiana Appellate Court, sitting *en banc*, held that a judge who committed a criminal defendant to jail after the expiration of a suspended sentence acted with a total lack of jurisdiction and could be liable in civil damages.

As this Court has ruled:

> All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to the transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments . . . Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of

> procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by law. *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876).

In *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), a case which arose from a factual situation very similar to the case at bar, an Ohio probate judge was sued for monetary damages arising out of his order that a mentally retarded woman should be sterilized. In support of his contention that his actions should be cloaked with judicial immunity, he relied upon the statute conferring general jurisdiction upon probate courts, which declared: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute." *Id.* at 673.

The federal district court rejected the contention that this general jurisdictional provision provided a basis for a sterilization order and held that the probate judge had "acted wholly without jurisdiction in this matter." *Id.* at 674. The court observed further:

> There is no statute in Ohio which authorizes a judge to order sterilization for any purpose. Nor has this Court been able to discover any judicial precedent for such an order in the absence of a specific statute . . .
>
> Indeed, in the only case where an appellate court has considered the possibility of sterilization in the absence of specific statutory authorization, the court affirmed the lower court judgment which concluded that sterilization was not within the general equity power of the court and that it was a



> matter to be dealt with by the legislature. *Holmes v. Powers*, Civ. No. 4151 (Cir. Ct. Whitley Cty., Ky. 1968), *aff'd* 439 S.W. 2d 579 (Ct. App. Ky., 1968). *Id.* at 673-674.

As an alternative source of jurisdiction to authorize sterilizations Petitioner relies upon Burns Ind. Stats. Ann. §§16-8-3-1 and 16-8-4-2 (1971), which permit parents to give consent to medical treatment for minors and legally incompetent persons. Petitioner's logic is difficult to follow because the cited statutory sections describe a power which is possessed by parents, and say nothing about the jurisdiction of any court. It is doubtful that a legislative provision conferring authority on private citizens can somehow expand the jurisdiction of a court beyond its otherwise statutorily assigned boundaries. Moreover, if parents possessed the authority to have their children sterilized, then there would be no need or rationale for expanding the circuit court's jurisdiction to include sterilizations. Such a parental right could simply be exercised by the parent, without judicial involvement.

Even assuming, however, that parents can somehow bestow some of their parental authority to provide jurisdiction to the circuit courts of Indiana, such an assertion is still of no avail to Petitioner because the law is clear, in Indiana and elsewhere, that the parental authority to consent to medical treatment does not include the power to have the child sterilized. The parent cannot give to the court that which the parent does not have. Various courts have indicated that, while parental authority is great, it does not extend to the irreversible deprivation of the fundamental right of procreation by sterilization: *In re Lambert*, No. 61156 (Probate Ct. Davisson Cty. Tenn., filed March 4, 1976)

(mother seeking authority to consent to sterilization); *In re M.K.R.*, 515 S.W. 2d 467 (Mo. 1974) (mother seeking court authorization of sterilization); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (sterilization requested by father); *Frazier v. Levi*, 440 S.W. 2d 393 (Tex. Civ. App. 1969) (application for sterilization filed by mother).

In Indiana, this issue was decided definitively in *A.L. v. G.R.H.*, 325 N.E. 2d 501 (Ind. App. 1975), *hearing denied* May 29, 1975, *cert. den.* 425 U.S. 936 (1976) in which the Indiana Court of Appeals held that parents did not possess the legal authority to consent to the sterilization of their child, "We believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom." *Id.* at 502.

Moreover, this Court has never indicated that parental authority is unlimited:

> Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.
> *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

In *Wisconsin v. Yoder*, 406 U.S. 205 (1971), this Court, in considering the rights of parents to direct the religious upbringing of their children, observed:

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.
> *Id.* at 233-234.[27]



Nor has this Court permitted parents to interfere with their minor daughter's decision whether or not to have an abortion, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.
> *Id.* at 74.

Consistent with these principles, therefore, the general authority of parents over children, including the power to consent to medical treatment needed by the child, does not give a parent the legal authority to compel a child to undergo the drastic invasion of personal rights and permanent denial of the ability to procreate which characterize sterilization.

**D. Petitioner Clearly Lacked Jurisdiction Over the Person of Respondent.**

In addition to lacking jurisdiction over the subject matter of sterilization, Petitioner acted in the clear absence of jurisdiction over the person of Respondent. It is axiomatic

---

[27] Such limitation upon parental authority underlies our child neglect and child abuse laws and compulsory school attendance laws. A number of courts have held that parents do not have the right to refuse lifesaving medical services for their children. *e.g.*, *Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *Morrison v. State*, 252 S.W. 2d 97 (K.C. App. 1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962); *In re Clark*, 21 Oh. Op. 2d 86, 185 N.E. 2d 128 (1962). "No longer can parents virtually exercise the power of life or death over their children," *In re Clark*, 21 Oh. Op. 2d 86, 185 N.E. 2d 128, 131 (1962).

that courts must possess *in personam* jurisdiction over the parties involved in a legal proceeding.

> The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957).
> *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 110 (1969).

In *Harris v. Hardeman*, 55 U.S. 334 (1852), the Court declared:

> [J]udicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the court, and not appearing in person or by attorney, are null and void.
> *Id.* at 339-340.

The methods for obtaining jurisdiction over the person are equally well-established: "Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause," *Cooper v. Reynolds*, 77 U.S. 308, 316-317 (1870). *See also, Robertson v. Labor Board*, 268 U.S. 619, 622 (1925); *Kendall v. United States*, 37 U.S. 524, 623 (1838).

In the present case, no notice was given to Respondent of the petition filed to have her sterilized, nor did she appear during the pendency of the action either in person or through counsel. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977). Indeed, she did not even learn that there had been such a proceeding and that she had been sterilized until four years had passed. *Id.* at 173. It is apparent, therefore, that the court never obtained jurisdiction over the person of Respondent, nor took any steps to do so.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court held that a girl, although a minor, was mature enough to become pregnant and thus was



mature enough to be entitled to make the decision whether or not to have an abortion. Likewise, in the present action, the Petitioner, who was mature enough to become pregnant, was at least entitled to be made aware of and to be involved in the decision to deprive her permanently of her procreative function.

**E. Petitioner Had Jurisdiction to Hear the Question of Jurisdiction, But No Jurisdiction to Consider and Approve the Petition.**

Petitioner argues that "each court has jurisdiction to determine its own jurisdiction" (Petitioner's Br. p. 15). If this statement means that a court has the power, and indeed the duty, to consider whether or not is has jurisdiction over each of the matters which come before it, then it is indisputable. It does not follow, however, that because a court has jurisdiction to consider the question of jurisdiction, it has jurisdiction to decide the merits of every matter brought before it. In the present action, the Petitioner did not merely determine its own jurisdiction, but, on the contrary, completely ignored the absence of jurisdiction and issued a judicial document which permanently deprived Respondent of her fundamental right to procreate.

In addition to jurisdiction over the subject matter and the parties, it is necessary for a court to have jurisdiction to render the remedy or judgment which it assumes to render. *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). In *Windsor v. McVeigh*, 93 U.S. 274 (1876), the Court declared:

> Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the

> subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.
> *Id.* at 282.

The boundaries of a court's authority in fashioning remedies and rendering judgments is determined by the extent of authority it is given by law in regard to a particular type of case.

> The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.
> *Cooper v. Reynolds*, 77 U.S. 308, 317 (1870).

In the instant case, while Petitioner may have had authority to examine the question of his own jurisdiction, he had no legal authority to consider and approve the petition for the sterilization of Respondent. In approving the sterilization, Petitioner went beyond his judicial authority and engaged in an action for which he lacked any jurisdiction.



**F. Jurisdiction of a Court Cannot be Exercised in Total Absence of Due Process of Law.**

*Windsor v. McVeigh*, 93 U.S. 274 (1876), involved a confiscation of land proceeding in the United States District Court for the Eastern District of Virginia. The District Court judge refused to allow the owner of the property to appear by counsel at the trial of the matter because the owner was loyal to the Confederate cause, and his land was subsequently confiscated. The Supreme Court held the proceedings to be a nullity because the District Court lacked jurisdiction:

> Jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.
> *Id.* at 283-284.

In the present case, where the rights at stake were much more important than mere ownership of land, Petitioner denied Respondent any semblance of notice, opportunity to be heard, or any other basic due process rights.

Petitioner approved the sterilization petition without any notice to Respondent or anyone else on her behalf, without any filing in court, without any hearing, without a guardian *ad litem* appointed to represent the young woman's interests, and without any opportunity to appeal the decision to have her sterilized. A more complete denial of the fundamentals of due process can hardly be imagined.

> The "right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle

> basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

Petitioner's failure to require that notice of the proceeding be given to Respondent and his failure to conduct a hearing where she could respond to the petition constitute such a significant deviation from accepted standards of due process that they place the case clearly outside Petitioner's judicial jurisdiction.

Moreover, the failure to conduct a hearing deprived Petitioner of knowledge of a number of crucial facts. Among the critical matters upon which the Petitioner did not hear any testimony, evidence, or arguments were:

1. Whether Respondent was mentally retarded or not.

Respondent's mother alleged that she was "somewhat retarded," but this contention was contradicted by the fact that she had succeeded in passing in public school classes along with other children her age. 552 F.2d at 173. No testing, evaluations, or other evidence was submitted to support the bare assertion that Petitioner was "somewhat retarded." There is nothing to indicate that Petitioner's mother is a psychologist or other professional qualified to assess intelligence or even that she is qualified to understand what the scientific term "mental retardation" means. Imposition of the label "mentally retarded" is significant enough that an opportunity to be heard is required before it



is applied. *See Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 295 (E.D. Pa. 1972). Moreover, if Respondent were found to be mentally retarded, evidence of the degree of mental retardation would be necessary to indicate the extent of her handicap and her functional ability.

2. Whether Respondent was likely to conceive a child.

The Petition contained an allegation by the mother that she was unable to "prevent unfortunate circumstances." 552 F.2d at 173. Yet no evidence was heard to substantiate the mother's implication that Respondent was engaging in sexual intercourse and was likely to become pregnant. An opportunity to be heard is constitutionally mandated before a person can be publicly labeled an excessive drinker. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Surely, an opportunity to be heard is equally necessary before one can be labeled a promiscuous person. "Where a person's good name, reputation, honor, or integrity is at stake . . . notice and an opportunity to be heard are essential." *Id.* at 437. Yet Respondent was given no opportunity to refute the implications that she was engaging in sexual relations. In addition, even if Respondent had been found to be sexually active, there was no evidence that she was unwilling or unable to use contraceptive devices or other methods for avoiding pregnancy. In short, there was no hearing upon the essential fact of whether Respondent was actually likely to give birth to a child.

3. Whether there was a compelling governmental interest justifying the sterilization of Respondent.

It is well established that a citizen cannot constitutionally be deprived of a fundamental right such as

procreation unless such deprivation can be shown to be necessitated by a compelling governmental interest. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also, San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n. 76 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). In the present case there was no hearing upon the question of whether such a compelling governmental interest for the sterilization of Respondent existed, and no suggestion of any governmental interest whatsoever which would be furthered by the sterilization.

4. The likelihood of children of Respondent having any hereditary defect.

One supposed justification for efforts to obtain compulsory sterilization of mentally retarded people is to prevent the birth of genetically defective children. However, even eugenics advocates admit that a mentally retarded parent has an 88 percent chance of having a "normal" child.[28] If, therefore, the Respondent had been found to be mentally retarded, it would have been important to determine the causation of her retardation and to determine whether her disability was hereditarily transmissible. Petitioner, however, did not hear any evidence in regard to these issues.

5. Whether there were less drastic alternatives to sterilization.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court declared:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal

[28] Reed, *Mental Retardation and Fertility*, 18 Supp. Social Biology 542 (1971).



> liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.
> *Id.* at 488.

Petitioner did not investigate or hear any evidence as to whether less drastic means, such as contraceptive devices and medications, would have equally well served the objective of preventing Respondent from becoming pregnant, without the grievous consequence of irreversible sterilization.

Petitioner did not bother to hear one scintilla of evidence concerning these or other issues raised by the petition for sterilization. In failing to do so, Petitioner deprived himself from any jurisdictional basis for his approval of the petition. "For jurisdiction is the right to hear and determine; not to determine without hearing." *Windsor v. McVeigh*, 93 U.S. 274, 283-284 (1876).

## II.

## THE ASSERTED BASIS FOR THE CREATION OF THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY IS UNSOUND AND UNSUPPORTABLE AND THE DOCTRINE SHOULD BE ABOLISHED.

42 U.S.C. §1983, the first section of the Civil Rights Act of 1871, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by

the Constitution and law, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

**A. Respondent Satisfies All Requirements for Recovery Under §1983.**

Judicial officers are proper defendants in §1983 actions. *Neal v. Brim*, 506 F.2d 6 (5th Cir. 1975); *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969) *aff'd on other grounds* 401 U.S. 154 (1971). The fact that Petitioner actually acted beyond the scope of his jurisdiction is immaterial in relation to the applicability of §1983; conduct engaged in by a state official even in the purported exercise of authority conferred by the state is action under color of law. The term "under color of law" includes acts of an official who can show no authority for what he does, *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). By virtue of the acts of Petitioner, Respondent has suffered deprivation of rights protected by the Constitution. *See* section IIIA, *infra*. The fundamental right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n. 76 (1973) and the right to bear and beget children, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965), have long been recognized



in this Court. Finally §1983 clearly contemplates money damage liability. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971). Thus, Petitioner is a state official who, while acting under color of law, deprived Respondent of a right secured by the Constitution for which an action at law is a proper remedy.

Although Respondent satisfies all prerequisites for recovery, she must still face Petitioner's contention that under the doctrine created in *Pierson v. Ray*, 386 U.S. 547 (1967) he is absolutely immune from money damage liability if he acted within the scope of his jurisdiction. Judicial immunity is inapplicable "where there is clearly no jurisdiction over the subject matter," *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-352 (1872); *accord Pierson v. Ray*, 386 U.S. 547, 554 (1967), or when the judge acts in a purely ministerial, not discretionary, fashion, *Ex parte Virginia*, 100 U.S. 339, 348 (1879). We have asserted in Section I, *supra*, that Petitioner acted in clear absence of jurisdiction, and thus the constraints of *Pierson* have no viability in this case. Amici suggest further that *Pierson v. Ray*, 386 U.S. 547 (1967) was wrongly decided and that the doctrine of absolute judicial immunity should be abolished. There is no constitutional bar to the abrogation of judicial immunity. The doctrine "has in large part been of judicial making." *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *accord Doe v. McMillan*, 412 U.S. 306, 318-319 (1973). The decision to abolish or attenuate the doctrine "is solely a question of statutory interpretation." *Pierson v. Ray*, 386 U.S. 547, 565 (Douglas, J., dissenting).

**B. The Justifications Relied Upon to Create Absolute Judicial Immunity are Not Supported Within the Common Law or Legislative History of §1983.**

Chief Justice Warren's rationale in *Pierson v. Ray*, 386 U.S. 547 (1967), for holding judges immune from liability in damages for judicial acts challenged under §1983, was two-pronged: (1) The doctrine of absolute immunity was incontrovertibly "established at common law;" *id.*, at 554; (2) [T]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* However, while the Chief Justice's opinion for the Court recognized that the doctrine of judicial immunity is entirely judge-made, he failed to assess accurately both its common law background and the legislative history of §1983, *Pierson v. Ray*, 386 U.S. 547 (Douglas, J. dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U. L. Rev. 615, 617-623 (1970); Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 727-740 (1977); Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 323-328 (1969).

1. Common Law

While some form of judicial immunity has a long history, *see Floyd v. Barker's Case*, 77 Eng. Rep. 1305 (Star Chamber 1608), that history is somewhat uneven. Originally, English law permitted civil suits against judges in actions complaining of false judgments, 2 F. Pollock & F. Maitland, *The History of English Law* 664-668 (2d ed. 1898). Later, when English common law created absolute immunity from tort liability, it applied only to judges of superior courts. The



Justices Protection Act, 11 & 12 Vict. c. 44 (1848); *see, Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). In this country, "absolute immunity from tort actions did not fully develop until the 1870's." Note, *Immunity of Federal and State Judges from Civil Suit – Time for Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 731 (1977). In a survey of 19th century case law in 14 randomly selected eastern and midwestern states, it was found that "in nine states the prevailing rule was absolute immunity, in four states immunity depended upon the judge's good faith, and in one state the law was inconclusive." *Id.* A more extensive survey revealed that "by 1871, thirteen states had adopted the absolute immunity rule; six states ruled that judges were liable if they acted maliciously, in nine states, courts had faced the issue but had not ruled clearly one way or the other; and nine states had apparently not faced the issue." Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 326-327 (1969).

When, in 1868, the Supreme Court considered the issue for the first time, it declared that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction are done maliciously or corruptly." *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). Thus, the Congress of the United States when it began its deliberations on H.R. 320, a bill to enforce the provisions of the fourteenth amendment, section one of which would eventually become §1983, could not have been laboring under the impression that the common law of either England or the United States unalterably, uniformly, or universally held that judges were absolutely immune from traditional remedies at law. It was not until a year after Congress enacted the predecessor to §1983 (17 Stat. 13 (1871) )that Justice

Field who had written *Randall*, amended the holding in *Bradley v. Fisher*, 80 U.S. (13 Wall.)335 (1872)), so that judges in courts of general jurisdiction were not liable for their judicial acts even when they acted in excess of their jurisdiction and maliciously or corruptly.

In the light of this history, it is disingenous to say that if Congress had wanted to abrogate absolute immunity for judges it "would [have] specifically so provided . . . " *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The "diligent congressman, looking to the federal rule in 1871, would have had no reason not to surmise that an incorrect ruling of law, maliciously made, which deprived an individual of his constitutional rights, would probably subject the offending judge to liability." Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 326 (1969).

There seemed to be little doubt seventy-five years later that absolute judicial immunity had been abolished. In deciding whether a civil action for compensatory and punitive damages could lie under then R.S. §1979 (now §1983) against a justice of the peace who refused a hearing to plaintiffs after arrest, the Third Circuit Court of Appeals ruled that "if the plaintiffs . . . were deprived of a federal right by state officials or officers acting 'under color of any law' . . . these officials must respond in damages to the plaintiffs as prescribed by R.S. §1979." *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 249 (3rd Cir. 1945). It continued, "As we read R.S. 1979 . . . we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." *Id.*



at 249. Facing the issue of a common law bar to judicial liability the court found

> that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that Act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person' . . . We can imagine no broader definition. *Id.* at 250.

It is conceded that *Picking* was expressly overruled by the third circuit in *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966). However, *Bauers* was decided before *Pierson* and relied primarily, but inappropriately, on the Supreme Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951). *Bauers v. Heisel*, 361 F.2d 581, 584-586 (3d Cir. 1966). *Tenney* held state legislators absolutely immune from money damage liability under one of the predecessors to §1983. But to ground judicial immunity on the basis of legislative immunity is genuinely to misread both the common law and the legislative history of the Civil Rights Act. "The immunity of legislators was more strongly entrenched in Anglo-American law prior to 1871 than was judicial immunity." Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?* 27 Case West L. Rev. 727, 736 n. 49 (1977). In 1951, when *Tenney* was decided, "forty-one of the forty-eight States . . . [had] specific provisions in their Constitutions protecting the privilege." *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). Moreover, one could find support for state legislative immunity in the Speech and Debate Clause of the United States Constitution, U.S. Const. Art. I, §6 (although three states had already written analogous provisions in their constitutions even before 1789, *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951)). Thus,

this Court reasonably could have doubted, as it did, "that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of §1983)." *Id.* at 376.

But, no such conclusion can be drawn with regard to judicial immunity and thus *Bauers'* reliance on *Tenney* in overruling *Picking* is misplaced. The common law did not unequivocally protect judges. There is no constitutional compulsion for judicial immunity as there is for legislators. The post Civil War Congress clearly expressed its disdain for judicial autonomy when it repealed the right of the Supreme Court to review habeas corpus cases, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); and, as will be shown, the legislative history of the 1871 Civil Rights Act clearly contemplated that judges would be liable for money damages. This Court has never been a slave to the common law, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (burden of proof in provocation defense); *Williams v. Florida*, 399 U.S. 78 (1970) (less than twelve person jury constitutional); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (less than unanimous jury constitutional); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (actual malice standard in libel actions by public officials). In any event, however one interprets the common law with respect to judicial immunity, when a statute is designed as a revision of a body of law, the common law gives way to the statute which is inconsistent with it. *See Hamilton v. Rathbone*, 175 U.S. 414, 418 (1899); *see also, Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting). The legislative history of §1983 reviewed immediately below unequivocally supports the contention that it was intended to hold state judges liable in money damages for their judicial



acts when those acts deprived persons of their constitutional rights.

2. The Legislative History of the 1871 Civil Rights Act

The historical underpinnings of §1983 have been amply described by this Court:

> Section 1979 [predecessor to §1983] came onto the books as §1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that Amendment. Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:
>
> > "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [Act of April 9, 1866, 14 Stat. 27], which has since become a part of the Constitution," *viz.*, the Fourteenth Amendment.
>
> *Monroe v. Pape*, 365 U.S. 167, 171 (1961); *see also Id.* at 171-185.

Because §1983 is a direct descendant of the Civil Rights Act of 1866, a detailed inquiry into the precise purposes and intent of the 42nd Congress with regard to judicial immunity

in passing the former properly begins with scrutiny of the latter:

> [The Supreme] Court has traced the origin of §1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. (citations omitted). That Act guaranteed "broad and sweeping . . . protection" to basic civil rights. (citations omitted).
>
> The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. (citations omitted) . . .
>
> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakenly evident in the legislative history of §1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of §§1983 and 1343 (3). Not only was §1 of the 1871 Act derived from §2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment."
> *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543-545 (1972); *accord, Mitchum v. Foster*, 407 U.S. 225 (1972).

This interpretation of the reach and meaning of §1983 is directly supported by the remarks of Rep. Shellabarger to the House of Representatives in reporting out the Ku Klux Act of 1871: "The model for it will be found in the second section of the act of April 9, 1866 . . . That section provides a criminal proceeding in *identically the same case* as this one provides a civil remedy . . . " Cong. Globe, 42nd Cong., 1st Sess., app. 68 (1871) (emphasis added).

What, then, were the cases in which criminal proceedings were envisioned and who were considered to be proper



defendants in those cases? Scrutiny of the legislative history of the 1866 Act unmistakably indicates that both proponents and opponents of the bill in the Senate and the House contemplated that judges would be potential defendants. Sen. Trumbull, one of its sponsors viewed §2 as "the valuable section . . . When it comes to be understood . . . that any person who shall deprive another of any right . . . will expose himself to fine and imprisonment, I think such acts will cease." Cong. Globe, 39th Cong., 1st Sess., 475 (1866).[29]

---

[29] In a colloquy between Sen. Trumbull and Sen. Cowan, one of the opponents of the bill, which followed the assertion quoted immediately above, it became clear that judges were not to be absolutely immune from the reach of the 1866 Act:

> Sen Cowan: [A]s I understand the bill, this kind of case might occur: The State judge might be honestly of the opinion that a State law was not in conflict with the United States law, and yet, as I understand it, he may be dragged into the United States court and punished in that court as a criminal by fine and imprisonment . . .
>
> Sen. Trumbull: [I]f an honest judge misconceives the law, and makes a mistake in judgment without any intention to disregard the law, would any jury in America convict him? He will be in no danger.
>
> Sen. Cowan: Then I will ask if that does not come into conflict with another principle of law – whether a judge in a criminal court can be held responsible for the integrity of his intentions as to the decisions he makes?
>
> Sen. Trumbull: . . . If he is not responsible, I have faith that the judges of the United States courts will so decide. The bill provides that persons who

Not only did both houses of Congress explicitly recognize that §2 of the 1866 Act would subject judges to criminal prosecution, but so did the President of the United States, Andrew Johnson. In his message to Congress, explaining his reasons for vetoing the measure, he declared:

> [I]t is therefore assumed that under this section . . . that judges of the State courts who should render judgments in antagonism with its terms . . . could be brought before other tribunals

---

Footnote [29] (Continued)

> subject others to punishment in consequence of race or color and not in consequence of crime, shall themselves be punished, and that this may be done in the United States courts.
> Cong. Globe, 39th Cong., 1st Sess., 475-476 (1866).

A similar exchange occurred in the House between Rep. Eldridge and Rep. Thayer:

> Rep. Eldridge: [Referring to §2] This bill . . . seeks to lay prostrate at the feet of the Federal Government the judiciary of the States . . . [I]t attempts to destroy the independence of the State judiciary.
>
> [L]et me ask the gentleman from Pennsylvania, [Mr. Thayer], by what provision of the Constitution is the Federal Government authorized to affix a penalty to the decision which the judge of a State court may make in the exercise of the judicial function?
>
> Rep. Thayer: . . . I ask the gentlemen from Wisconsin whether in his judgment the United States have not the right constitutionally to enforce its own laws by pains and penalties?
> Cong. Globe, 39th Cong., 1st Sess., 1154-1155 (1866).



> and there subjected to fines and imprisonment . . .
> Cong. Globe, 39th Cong., 1st Sess., 1680 (1866).

In responding to the President's veto (later overridden), Sen. Trumbull, admitted "that a . . . judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may and ought to be punished; . . ." Cong. Globe, 39th Cong., 1st Sess., 1758 (1866).

Thus, the criminal analogue of the 1871 Civil Rights Act, *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); *Littleton v. Berbling*, 468 F.2d 389, 399 (7th Cir. 1972) *rev'd on other grounds O'Shea v. Littleton*, 414 U.S. 488 (1974), undoubtedly imposed penalties on state judges:

> On at least two occasions amendments to delete the imposition of criminal liability on state judges were unsuccessfully introduced. Interestingly enough, the second such amendment would have substituted *civil liability* for judges (in words almost identical to §1983) for criminal liability. The Act's sponsor, in opposing this amendment, pertinently commented that the issues as to criminal and civil liability were identical – if Congress could constitutionally make judges civilly liable, it could make them criminally liable and vice versa. A leading spokesman for judicial liability was Representative Shellabarger, the *author of the Ku Klux Klan Act of 1871.*[30] Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray Reconsidered*, 75 Nw. U.L. Rev. 615, 622 and notes therein (1970).

---

[30] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951) quoted in *Bauers v. Heisel*, 361 F.2d 581, 588 n.8 (3rd Cir. 1966).

It is not solely through reliance on the 1866 Act that one concludes that §1983 abolished judicial immunity. As with its criminal counterpart, the legislative history of the 1871 statute indicates that both its advocates and opponents understood that the "breadth of [its] remedy," *Monroe v. Pape*, 365 U.S. 167, 178 (1961), would cover judges.

Proponents of the Act perceived the courts as one of the major sources of the deprivation of rights. Representative Perry viewed judges, "having ears to hear [but] hear not," permitting "gangs of assassins" literally to get away with murder, Cong. Globe, 42nd Cong., 1st Sess., app. 78 (1871). "In the presence of these gangs . . . all the processes of justice sulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." *Id.* Rep. Garfield expressed the concern that the chief problem was not unequal law but that because of "systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42nd Cong., 1st Sess., app. 153 (1871). The remedy, he said, was for "Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.* Rep. Platt complained that it was almost impossible to "secure as plaintiff or defendant anything like equal justice before the courts of the State." Cong. Globe, 42nd Cong., 1st Sess., app. 185 (1871). Warming to the debate, he continued his litany of charges:

> [T]he old Democratic officers . . . are sustained in their course by the county judge; . . . the decisions of the county judges, who are made little kings, with almost despotic powers . . . – powers which almost without exception have been exercised . . . without regard to law or justice, make



> up a catalogue of wrongs, outrageous violations, and evasions of the spirit of the new constitution, unscrupulous malignity and partisan hate never paralleled in the history of parties in this country or any other.
> *Id.* at app. 186.

Rep. Porter referred to these violations and evasions as "legalized outrages," Cong. Globe, 42nd Cong., 1st Sess., app. 277 (1871), which he demanded the Act to reach. Yet, despite the fact that judges "were parties or in sympathy" to these outrages "or paralyzed by fear . . . ." Rep. Stevenson was alarmed that without passage of the Act, there would be "no relief for the injured." Cong. Globe, 42nd Cong., 1st Sess. app. 297 (1871).

Not only did proponents envision judicial liability. Rep. Arthur, a vehement opponent declared that, "Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly or criminally, for judicial acts . . . Willfulness and corruption. . .alone created a liability. . . Cong. Globe, 42nd Cong., 1st Sess. 365 (1871). Thus, he clearly recognized that §1 would abrogate whatever judicial immunity existed in 1871. Rep. Lewis also recognized the importance of the future §1983: "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be . . . " Cong. Globe, 42nd Cong., 1st Sess., 385 (1871). Rep. Lewis, therefore, contemplated civil actions even when judges acted within their jurisdiction and without malice. These incursions on judicial immunity of state judges were defended by Rep. Lowe who asserted that there was no other legal machinery available for enforcing the fourteenth amendment than to "throw open the doors of the United States courts to those

whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd Cong., 1st Sess. 376 (1871).

This delineation of the legislative history in no way exhausts the support found in that history for the proposition that §1 of the Civil Rights Acts of 1871 was intended to create civil liability for judicial officers.[31] See also Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U. L. Rev. 615 (1970); Note, *Immunity of Federal and States Judges from Civil Suit – Time for a Qualified Immunity?* 27 Case West. Res. L. Rev. 727 (1977); Note, *Liability of Judicial Officer Under Section 1983*, 79 Yale L.J. 322 (1969). Whatever may have been the case with legislators, it is clearly erroneous to presume that Congress did not specifically wish to abolish the doctrine of absolute judicial immunity in civil rights cases.

This Court, both before and after *Pierson*, has continually construed the Civil Rights Acts to accord them "a sweep as broad as its language." *United States v. Guest*, 383 U.S. 745, 801 (1966); *accord*, *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Price*, 383 U.S. 787 (1966). Justice Douglas' assertion that remedial statutes are to be liberally construed, *Pierson v. Ray*, 386 U.S. 547, 561 n. 1 (1967) (Douglas, J., dissenting), is not only an accepted canon of statutory construction, but the legislative history of the 1871 Civil Rights Act indicates that the statute should be construed

---

[31] Similar support, though not as extensive, exists for the conspiracy provisions of the Act (now 42 U.S.C. §1985). *See e.g.*, Cong. Globe, 42nd, 1st Sess., 366 (1871) (Rep. Arthur); *Id.* at app. 167 (Rep. Pool).



in precisely that manner. In speaking of §1, Rep. Shallabargar, its sponsor, said:

> This act is remedial, and in the aid of the preservation of human liberty and human rights. All statutes . . . are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and gives remedies for their wrongs to all the people.
> Cong. Globe, 1st Sess., app. 68 (1871).

One hundred years later, this Court left no doubt that §1 was to be given the broad scope intended by Rep. Shellabarger:

> It is clear from the legislative debates surrounding the passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 U.S. 339, 346. Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop the deprivations or were in league with those who were bent on abrogation of federally protected rights.
>
> . . . .
>
> Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state

courts' failure to secure federal rights. The debate was not about whether the predecessor of §1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

> This legislative history makes evident that Congress . . . was concerned that state instrumentalities could not protect [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
> *Mitchum v. Foster*, 407 U.S. 225, 240-242 (1972).

After surveying the legislative history of §1983 in *Mitchum*, Justice Stewart, in his opinion for the Court, concluded that in carrying out the purpose of the statute – to interpose the federal courts between the States and the people when executive, legislative, or judicial action deprived persons of their federal rights – Congress plainly permitted injunctive relief because, he said, §1983 "expressly authoriz[ed] a 'suit in equity' as one of the means of redress." *Id.* at 242. In like manner, the very same statute expressly authorizes "any action of law." 42 U.S.C. §1983.

**C. The Interests Undergirding the Continuance of Absolute Judicial Immunity From Civil Damage Liability Under Section 1983 Are Not Logically Supportable.**

In vindicating constitutional rights this Court has upheld as against judges, the use of criminal penalties, *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *cf. Ex parte Virginia*, 100 U.S. 339 (1880), and, in certain prescribed instances, injunctions, *Mitchum v. Foster*, 407 U.S. 225 (1972). In addition, it has, despite common law, *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) and precedent, *Spalding v. Vilas*, 161 U.S. 483 (1896),



abrogated absolute immunity for money damage liability for government officials in the executive branch, even when they act within the scope of their powers. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Yet, it has created a barrier to such recovery when state judicial officers engage in conduct leading to a denial, dilution, or abrogation of constitutional rights. However, rather than perpetuate the existence of this barrier, *amici* urge a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). The review of the common law in Section II B 1, *supra*, has already eroded some of the foundations of the doctrine of judicial immunity; scrutiny of the interests behind it should further its collapse.

The judicial immunity doctrine is largely judge-made. *Doe v. McMillan*, 412 U.S. 306, 318 (1973). The doctrine "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Batteo*, 360 U.S. 564, 572-573 (1959). This Court has proferred two bases for judicial immunity: (1) [J]udges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 547, 554 (1967); (2) Judges "should not have to fear that unsatisfied litigants may hound [them] with litigation . . . " *Id.* These two contentions by no means exhaust the policy justifications. They include, in addition to the need for an independent judiciary and the possibility of harassing and vexatious litigation, the need for finality in judicial proceedings, the possibility of diminished respect for judges, the establishment of disincentives to entrance into the judiciary, the concern that decision-making will be influenced by fear of subsequent suit, the assertion that duty of judges is to the public and not

to private citizens, and the belief that alternate means exist for redress of grievances. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347-350 (1872); *Randall v. Brigham,* 74 U.S. (7 Wall.) 523 (1868); *Yaselli v. Goff,* 12 F.2d 396, 399-404 (2d Cir. 1926) *aff'd per curiam* 275 U.S. 503 (1927); *see generally Littleton v. Berbling,* 468 F.2d 389, 412-413 (7th Cir. 1972) *rev'd on other grounds, O'Shea v. Littleton,* 414 U.S. 488 (1974); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983,* Rutgers-Camden L.J. 65, 69-71 (1976); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray, Reconsidered,* 63 Nw. U.L. Rev. 615, 633-637; Jennings, *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263, 271-272 (1936); Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?,* 27 Case West. Res. L. Rev. 727, 741-743 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L.J. 322, 329-334 (1969). Each of these contentions has been considered inadequate or erroneous support for the continuance of absolute immunity *See* Brazier, *Judicial Immunity and the Independence of the Judiciary,* Public Opinion 397 (Winter 1976); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray, Reconsidered,* 65 Nw. U.L. Rev. 615, 633-637 (1970); Note, *Immunity of Federal and State Judges from Civil Suit-Time for a Qualified Immunity?,* 27 Case West. Res. L. Rev. 727, 741-743 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L.J. 322, 329-334 (1969). In addition, *amici* wish to stress two points in subsections D and E below.

**D. The Justifications Offered For Absolute Judicial Immunity Apply Equally to Other State Officials for Whom This Court Has Abolished the Doctrine.**



Late in the last century this Court upheld absolute immunity for executive officials:

> [T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by the heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.
> *Spalding v. Vilas,* 161 U.S. 483, 498 (1896).

Yet, three quarters of a century later, this Court found the policy reasons alluded to no longer appropriate and held that executive officers were not to be accorded the privilege of absolute immunity. *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In reviewing the scope of §1983, the Court found that it was designed to prevent the misuse of power possessed by virtue of state law and thus could not exempt government officials totally from money damage liability. *Id.* at 243 citing *Monroe v. Pape,* 365 U.S. 167 (1961) and *United States v. Classic,* 313 U.S. 299 (1941). It further reasoned that:

> Under the criteria developed by precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has "the quality of a supreme and unchangeable edict, overriding all conflicting rights . . . unreviewable through the judicial power of the Federal Government." (citation omitted).
> *Id.* at 248.

In reaching this conclusion the Court relied heavily on Chief Justice Hughes assertion that:

> When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.
> *Sterling v. Constantin*, 287 U.S. 378, 398 (1932).

The situation envisioned by the Chief Justice exists here. By the putative assertion of state power a judge has forever foreclosed the possibility of exercising one constitutional right, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation) and trespassed on another, *Roe v. Wade*, 410 U.S. 113 (1973) (self-determination with regard to bodily integrity). Nothing less than a civil suit for damages can vindicate involuntary loss of these rights. Petitioner ordered an invasive operation without a hearing, without the production of evidence, without counsel for the patient, and under conditions amounting to misrepresentation, if not fraud. That operation has taken place and neither it nor the acts of the Petitioner which permitted the irreversible abrogation of fundamental rights can be enjoined. *See* Section IIIA. If a governor of a large state who is forced to make rapid decisions in the face of civil disorder is not absolutely immune for his actions, there is no rational basis for barring a civil suit against a judge who, by virtue of his office and the nature of the proceeding, has considerably more time to contemplate and reflect before arriving at a decision.

**E. If Injunctions Against State Judicial Officers Are Permissible, It Is Unreasonable to Bar Money Damage Recovery.**

There is no absolute bar to injunctive relief against the action of state judges. *Mitchum v. Foster*, 407 U.S. 225



(1972); *Erdmann v. Stevens;* 458 F.2d 1205 (2d Cir. 1972); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969). Yet, all of the policy bases for barring civil suits pertain to the granting of injunctions. The availability of injunctive relief opens judicial officers to harassing and vexatious litigation, may create undue influence on decision-making, could diminish respect for the judiciary, and lengthens judicial proceedings. More pertinently, availability of the injunction creates the potential for civil contempt in those instances where it is disobeyed, even when the injunction may not be proper. *Cf. Walker v. City of Birmingham*, 388 U.S. 307 (1967). Compensatory relief is the proper remedy for civil contempt and thus the enforcement phase of an injunction is comparable to a damage action. Address by Prof. Fiss, Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University 8 (April 5 & 6, 1976). "The citizen-plaintiff can commence an enforcement proceeding designed to coerce compliance with the injunction . . . He can also seek to obtain compensation for the harm caused by the violation." *Id.* at 21. This Court has specifically permitted compensatory damage recovery for civil contempt. *Leman v. Krentlar-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

It is thus anomalous to permit damage recovery in one context and not in another, in the light of the proferred justifications for the absolute immunity rule. A bar to money damage also precludes recovery in situations where injunctive relief is no longer available, as in this case. More fundamentally, however, distinctions between or among remedies creates dangers inherent in any hierarchical conception of remedies:

> [W]e should not supplant one remedial hierarchy with another. Instead we should move to a

> non-hierchical conception of remedies. The choice of remedy should not turn on generalized propositions – couched in the obscure but colorful language of history – about which remedies are favored and which are disfavored. Instead, it should turn upon an appreciation of the technical advantages of each remedy, and a judgment, made in the light of the substantive claim, about the desirability of the allocation of power that is implicit in each remedial system.
> Address by Prof. Fiss, The Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University 96-97 (April 5 & 6, 1976).

Under a system of total immunity no reasoned choices among remedies is available. There is no opportunity to balance the public good that might be posited for immunity in a particular instance against the right of private citizens to recover for egregious violation of constitutional rights. The present system precludes case by case analysis and rests solely on the conclusive presumption that the public good is invariably served by the absolute immunity doctrine.

Abrogation of absolute immunity in Germany and France has not undermined their judicial systems. Note, *Immunity of Federal and State Judges From Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 743-751 (1977). The protection of the public, the judiciary, and the injured plaintiff is better served through the development of standards both for deterring harassing litigation, Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. Rev. 615, 633-637 (1970), and adjudicating claims against judicial officers. Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 766-767 (1977).



## III.

## IF NOT TOTALLY ABOLISHED, THE DOCTRINE OF JUDICIAL IMMUNITY SHOULD BE ATTENUATED TO ALLOW THE RECOVERY OF DAMAGES IN SITUATIONS WHERE A JUDICIAL ACT CREATES AN IRREVERSIBLE ABROGATION OF FUNDAMENTAL RIGHTS WITHOUT ANY ALTERNATIVE REMEDY.

*Amici* have contended, in Section II, *supra*, that *Pierson v. Ray*, 386 U.S. 547 (1967) was wrongly decided and that judicial immunity as a bar to money damages in actions under 42 U.S.C. § 1983 should be abolished. However, even if *Pierson* is allowed to stand, *amici* submit that the doctrine of judicial immunity should not be applied in a situation like the present case where its application would result in the deprivation of fundamental constitutional rights without any remedy.

### A. The Fundamental Constitutional Rights At Stake

It is well settled that a state official's acts, under color of state law, which deprive a person of rights protected under the United States Constitution, provide ample basis for an action under 42 U.S.C. 1983. *See* Section IIA, *supra*. In the instant case Petitioner's authorization of sterilization for Respondent deprived her of fundamental constitutional rights to privacy and to procreate. Like the other civil rights which this Court has recognized as fundamental, i.e., voting, *see Williams v. Rhodes*, 393 U.S. 23 (1968), and political association, *see Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967), the rights to privacy and to procreate are deeply rooted in our traditions and basic to our system of

liberty. As this Court has described fundamental constitutional rights:

> (T)hey are . . . the very essence of a scheme of ordered liberty. To abolish them is . . . to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (citations omitted)
> *Palko v. Connecticut*, 302 U.S. 319 325 (1937); *see also, Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

An examination of the doctrines of the rights to privacy and to procreate as they had developed by 1971 (when Petitioner acted to deprive Respondent of these rights) reveals that these rights are fundamental. This Court had stated explicitly that the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy was a fundamental right. *Stanley v. Georgia*, 394 U.S. 557 (1969). Although in *Stanley*, this Court addressed the question of privacy in relation to the First Amendment, the *Stanley* decision in fact represented application of a firmly established doctrine in a new context. In a long line of cases this Court has consistently acknowledged a right to privacy of one's person either as within the liberty interest protected by the fourth and fourteenth amendments or as an essential part of our common law heritage. *See Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891), ("the right of every individual to the possession and control of his own person"), *Jacobson v. Massachusetts*, 197 U.S. 11, 29 1905, ("a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), ("freedom from bodily restraint"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), ("the right to be let alone"). It was precisely this



sphere of personal privacy, long recognized under the Constitution and common law, that Petitioner invaded when he approved Respondent's sterilization.

Moreover, not only was Respondent's right to privacy at stake in this case, but so was her related right to procreate, or to be free from involuntary sterilization. Because sterilization is an irreversible medical procedure, it permanently prohibits the person upon whom it is performed from bearing or begetting children. Therefore, Respondent's right to be free from involuntary sterilization is inherent in her right to procreate.

Like the right to privacy, the right to procreate is fundamental. In 1942 this Court considered the issue of procreation in the landmark case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In striking down the state criminal statute in question as a violation of equal protection, this Court stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.
> *Id.* at 541.

Thus this Court recognized procreation as a fundamental civil right, identifying its basis as the necessity to preserve the right to procreate for all individuals whose survival could be jeopardized by indiscriminate approval of an irreversible

operation. The Court's elevation of procreation to the stature of a fundamental right in *Skinner* was underscored in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) when the Court characterized *Skinner* as a right to privacy case, leaving no doubt about its importance. *Skinner* was not merely an expression of the right to procreate within the narrow confines of an equal protection challenge to a criminal statute; it was a watershed opinion of the same magnitude as the right to privacy cases which had preceded it. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34, n. 76 (1973).[32]

*Skinner* and *Griswold* make it clear that long before 1971, when Petitioner approved the sterilization of Respondent, procreation was an established constitutional right. The evolution of constitutional doctrine in recent years has made it clear that the rights to privacy and to procreate are closely related both in source and in application. *See Roe v. Wade*, 410 U.S. 113, 152 (1973). The consequence of this dual development in constitutional doctrine by 1971 was that Respondent had clearly established and fundamental constitutional rights at stake when Petitioner authorized the sterilization that permanently deprived her of the ability to exercise those rights.

**B. Damages Is The Only Remedy Available and Appropriate to Redress the Violation of Respondent's Constitutional Rights Caused by Petitioner's Authorization of Her Sterilization.**

It might seem that it is unnecessary for this Court to find Petitioner liable in damages because a host of more appropriate remedies are available to resolve the dispute in

[32] Later cases dealing with the right to bear and beget children include: *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).



this case. In reality, however, this proposition is untrue; no remedies except damages are available or appropriate to compensate Respondent for the permanent violations to her constitutional rights which Petitioner caused. The traditional equitable remedies are all inadequate. The coercive remedy of injunction can provide no relief; it is too late to enjoin Petitioner from permitting an operation which has already occurred. A declaratory judgment would be a hollow gesture for the same reason. Similarly, restitutionary relief is wholly inadequate since no judicial decree can restore to Respondent the precious personal rights of which Petitioner has deprived her.

It might also be argued that the proper way to challenge a judicial decision is to appeal from it, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), and that this is the course Respondent should have followed. *Pierson v. Ray* concerned the liability of a judge in damages under 42 U.S.C. §1983 for an unconstitutional conviction. Judicial conduct in that context is, of course, appealable or subject to habeas corpus relief. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). The instant case, however, did not arise from an illegal criminal conviction. Thus post-conviction remedies are inappropriate for Respondent to pursue. Moreover, these options were foreclosed to Respondent altogether. Respondent had no knowledge that the operation performed on her on July 16, 1971, was a sterilization procedure. At the time, she was told it was to be an appendectomy. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977). It was not until May of 1975 that Respondent learned from her attorney that he had reviewed a letter from the surgeon who had performed the operation in which its true nature was disclosed. Moreover, at no point during this four year period was Respondent represented by counsel. Indeed, it was not until she sought legal advice in 1975 in connection with her marital problems

that Respondent had ever discussed the sterilization operation with an attorney. This combination of factors – deception, lack of information, lack of knowledge that she should seek legal counsel – all made it impossible for Respondent to appeal from or to mount any collateral attack to Petitioner's authorization of her sterilization in time to prevent its occurrence.[33]

Despite the unavailability of certain equitable remedies or appellate review, it might be asserted that the doctrine of judicial immunity never contemplated immunization of the judiciary for the criminal deprivation of constitutional rights and therefore the appropriate action for Respondent to take would be to file criminal charges so that prosecution could be initiated under state law or under 18 U.S.C. §242, the criminal analogue to 42 U.S.C. §1983; *see Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Ex parte Virginia*, 100 U.S. 339 (1879). The remedy of criminal prosecution is, however, insufficient to compensate Respondent for the loss of her constitutionally protected rights. Prosecution under state or federal law is discretionary with the prosecutor; it may never occur. Moreover, even a successful criminal prosecution would be an inadequate remedy in the instant case because, at best, it would result in punishment of Petitioner without requiring him to take any action which would vindicate Respondent's constitutional rights. It is simply an inappropriate sanction where compensation for permanently denied personal rights is sought.

---

[33] Moreover, even if appeal had been available to Respondent, the fact that a person need not pursue his state remedies before instituting a §1983 action, *Monroe v. Pape*, 365 U.S. 167 (1961), would seem to indicate that appealability is not a sufficient protection where it is alleged that constitutional rights have been violated.



Lastly, it might be contended that, even if equitable, appellate and criminal remedies are insufficient, impeachment of Petitioner is a solution yet open to Respondent. This remedy, however, is no more adequate than the rest. Impeachment is ineffective because it is seldom used[34] because legislators frequently may be unwilling to avenge a judicial harm to a particular individual. Moreover, even if impeachment is invoked with success, the person injured gains no benefit except revenge.[35] For these reasons the slim possibility of that Petitioner might be impeached affords no relief commensurate with the deprivations Respondent has endured.

Having demonstrated the insufficiency of alternative remedies, *amici* turn now to a justification of damages as the only appropriate remedy in this case. As this Court stated so forcefully in the case of *Marbury v. Madison*, 1 Cranch 137 (1803).

> . . . it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded (citing 3 Blackstone's Commentaries 23).
> *Id.* at 163.

---

[34] Note, *The Liability of Judicial Offenders Under Section 1983*, 79 Yale L.J. 322 (1969). "A survey of forty states found that a total of only fifty-two impeachment proceedings had ever been instituted, resulting in nineteen removals. Brand, *The Discipline of Judges*, 46 ABAJ 1315 (1960). *See* Miller, *Discipline of Judges*, 50 Mich. L. Rev. 737 (1952)." *Id.* at 332-333 n. 57.

[35] Note, *The Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 333 (1969).

This principle has been relied upon consistently by this Court in permitting the recovery of damages in cases litigated under federal statutes which created a right without specifying a remedy. *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930); *Texas and Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916). Moreover, in a pair of cases like the instant one where the conduct of state judicial officers was challenged as violative of the fourteenth amendment, this Court permitted plaintiffs to bring a cause of action for damages: *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). Similarly, the principle enunciated in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), has been applied to allow an award of damages in cases challenging actions by federal officials who invaded constitutional rights. For instance, in *Bell v. Hood*, 327 U.S. 678, 684 (1946), this Court, citing *Marbury* and *Texas and New Orleans Railroad Co.*, 281 U.S. 548 (1930), allowed private citizens to sue for damages in federal district court to contest the actions of F.B.I. agents for alleged violations of the fourth and fifth amendments even though those amendments did not expressly create such a remedy.[36] In so ruling, this Court recognized that "where legal rights have been invaded, and a federal statute provides

---

[36] *See also, Terry v. Ohio*, 392 U.S. 1, 15 (1968), where this Court stated that its approval of restrained investigative conduct by police officers was not meant to discourage the use of remedies other than the exclusionary role to curtail uses for which that sanction might prove inappropriate. In *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court cited *Terry v. Ohio* to reaffirm and clarify its statement in that case. "The reasonableness of a warrantless public arrest may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer . . . "
*Id.* at 680 n. 48.



for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."
*Bell v. Hood*, 327 U.S. 678, 684 (1946).

Relying upon *Bell v. Hood* and *Nixon v. Condon*, this Court also permitted citizens to bring a cause of action for damages to contest an arrest and search by F.B.I. agents as violative of the personal right of privacy protected by the fourth amendment. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In reaching this decision, this Court noted what *amici* pray it consider in this case: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

Not only has this Court permitted damage actions to lie in situations like those described above to compensate for violations of fundamental constitutional rights, this Court allowed a damage action in a recent case litigated under provisions of federal civil rights statutes similar to the ones relied upon by *amici*. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), black citizens sued a Virginia corporation alleging its conduct constituted invasions of their rights under 42 U.S.C. § § 1981 and 1982. This Court found that a cause of action for damages could lie, reasoning that, "Congress by 28 U.S.C. § 1343(4), created federal jurisdiction for 'damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ' " *Id.* at 238. Furthermore, in discussing the appropriateness of damages as a remedy, the Court stated, "The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.* at 240.

Although the principles discussed above regarding damages did not develop in the specific context of allegations raised under 42 U.S.C. §1983, they should be applied with equal vigor to the case at bar. In Respondent's case, as in *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), and in *Texas and Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916), federally created rights are relied upon. Also, in this case, as in *Bell v. Hood*, 327 U.S. 678 (1946), and in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), substantial invasions of federally protected interests in liberty and privacy are at issue. Similarly, as in *Nixon v. Herndon*, 273 U.S. 536 (1927), and in *Nixon v. Condon*, 286 U.S. 73 (1932) the conduct of judicial officers in violation of constitutional rights is being challenged. Finally, as in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), this case concerns the imposition of damages as the appropriate remedy in response to the impairment of a right created by a federal civil rights statute.

Any doubt as to the propriety of permitting damages in a §1983 case should be dispelled by this Court's recent opinion in *Ingraham v. Wright*, 430 U.S. 651 (1977).[37] There, school children sued public school officials for damages in an action brought under 42 U.S.C. §§ 1981-88 in regard to paddling incidents which allegedly occurred at a public junior high school. Citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *Union*

[37] It should also be noted that the Seventh Circuit Court of Appeals readily acknowledges that courts have traditionally assessed damages for tortious injury in civil rights litigation. *See Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579-580 (7th Cir. 1975).



*Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Palko v. Connecticut*, 302 U.S. 319 (1937) – some of the same cases cited herein to demonstrate that Respondent's fundamental constitutional rights are at issue, see Section IIIA, *supra* – this Court found that the historic interest in liberty included plaintiffs' right to be free from, and to obtain judicial relief for, unjustified intrusions upon their personal security. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Mr. Justice Powell, writing for the majority, determined that this constitutionally protected liberty interest did not warrant the interjection of substantial procedural due process protections prior to the imposition of corporal punishment in the public schools. In rendering this decision, Mr. Justice Powell stressed that elaborate procedural due process prior to punishment was unnecessary because the child had recourse to civil and criminal proceedings to challenge excessive infliction of corporal punishment. *Id.* at 670, 678. In short, the Court reasoned that:

> The subsequent civil and criminal proceedings available in this case may be viewed as affording substantially greater protection to the child than the informal conference mandated by *Goss*.
> *Id.* at 678, n. 46.

Mr. Justice White, writing in dissent, characterized the civil proceedings quoted above as an action to recover damages, *id.* at 699 (White, J., dissenting) leaving no doubt about the meaning of Mr. Justice Powell's words. Justice Powell regarded damages as an appropriate remedy in §1983 actions to compensate individuals for invasions of their constitutional rights by public officials. Without question, Mr. Justice Powell's reasoning should be applied to the instant case. Respondent, more so than the school children in *Ingraham v. Wright*, suffered irreparable harm to her fundamental interests

in liberty. The invasion of her constitutional rights to privacy and to procreate is far more serious than the excessive corporal punishment to which Mr. Justice Powell referred as being proper for challenge in civil proceedings. For these reasons, Respondent contends that it is proper and consistent with this Court's opinion in *Ingraham v. Wright* that she be permitted to recover damages.

In summary, 42 U.S.C. §1983 was designed to guarantee a broad and sweeping protection to basic civil rights. *Lynch v. Household Finance Corporation*, 405 U.S. 538, 543-544 (1972). Respondent has illustrated amply the depths to which her basic rights have been violated. Compensation for her losses demands no less than that afforded by the genuine remedy of damages.

In essence, to uphold the doctrine of judicial immunity in cases like the one Respondent brings, will be to preclude more than money damage recovery. "The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves." Cong. Globe, 42nd Cong., 1st Sess., 608 (Sen. Pool).



## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

December 16, 1977

Respectfully submitted,

ROBERT L. BURGDORF, JR.
DONALD N. BERSOFF
NANCY B. SHUGER
500 W. Baltimore Street
Baltimore, Md. 21201
*Attorneys for Amici Curiae*

MARCIA PEARCE BURGDORF
*Of Counsel*